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No. 02-

IN THE

Supreme Court of the United States

ADVANTA CORP. AND
ADVANTA MORTGAGE CORPORATION, U.S.A.,
Petitioners,

v.

MILTON RISEMAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal appellate court violates a defendant's Seventh Amendment right to a jury trial when it seeks to remedy a jury's demonstrable error in assessing a civil damage award by reducing the award on the basis of judicial speculation as to the jury's underlying findings.

STATEMENT PURSUANT TO RULE 29.6

Advanta Corporation is the corporate parent of Advanta Mortgage Corporation, U.S.A. No publicly held company owns 10% or more of Advanta Corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Advanta Corp. and Advanta Mortgage Corporation, U.S.A. (collectively, "Advanta") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a-12a) is not reported. The opinion and order of the district court (App. 13a-46a) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 8, 2002. A petition for rehearing was denied on August 8, 2002. App. 51a-52a. On October 23, 2002, Justice Souter extended the time for filing a petition for a writ of certiorari to and including December 6, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment to the United States Constitution provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

In this case, which involves a terminated employee's claim to certain bonuses, the court of appeals correctly determined that the jury's damage award exceeded the maximum amount to which the employee could ever have been legally entitled. The verdict form makes it impossible to ascertain the exact nature of the jury's error. The court of appeals nonetheless reviewed the record, drew its own conclusions concerning which bases of liability the jury intended to find, and calculated a new damage award based on that conjecture. The court refused the defendant's request for a new trial. Because the court of appeals' order rests on judicial speculation concerning the bases for the jury's original award, it impermissibly invades the province of the jury, in violation of the Seventh Amendment. The court's approach conflicts with that of this Court and other courts of appeals, reflects a more general confusion in the circuits concerning the proper use of appellate remittitur, and warrants intervention by this Court.

1. Respondent Riseman began working for Advanta in 1992. App. 13a. In 1994 he became President and Chief Executive Officer of Advanta Mortgage Corporation, U.S.A. *Id.* In April 1997, Advanta offered Riseman a bonus, equal to 200% of his base salary, in the event of a "change of control affecting [his] group" (the "1997 bonus"). App. 14a. In May 1998, Advanta offered Riseman another conditional bonus (the "1998 conditional bonus"), based on various factors.

App. 15a. In 1998 Riseman was also eligible for a bonus under the Advanta Management Incentive Program ("AMIP"), an annual performance bonus program designed to reward key executives based on individual performance and the performance of relevant business units. *Id.*

In August 1998, various disputes arose, and Riseman's employment thereafter ended. App. 15a-16a. Advanta determined that Riseman was not entitled to receive the 1997 bonus, the 1998 conditional bonus, or the 1998 AMIP bonus. *Id.*

2. Riseman sued Advanta in the United States District Court for the Eastern District of Pennsylvania. App. 16a. He alleged, among other things, age discrimination and retaliation in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, and violations of the Pennsylvania Wage Payment and Collection Law, 43 Pa. Cons. Stat. § 260.1 *et seq.* ("WPCL"). App. 2a-3a. The WPCL entitles employees to receive wages and benefits earned as of the date of their termination. Riseman claimed that Advanta's refusal to pay him the 1997, 1998 conditional, and 1998 AMIP bonuses violated both the ADEA and his contract rights, enforceable under the WPCL. Advanta denied any age discrimination, and contested Riseman's contractual claims to the different bonuses on various grounds.

The 1997 and 1998 conditional bonuses sought by Riseman were for specific amounts—$650,000 and $400,000, respectively. App. 2a, n.1. The 1998 AMIP bonus was variable. App. 15a. In his closing argument at trial, Riseman's attorney argued to the jury that if Advanta had not fired Riseman's in violation of the ADEA, Riseman would have received a 1998 AMIP bonus of several million dollars. That argument contradicted the trial evidence, including testimony from Riseman himself and his expert, that the 1998 AMIP bonus could not have exceeded Riseman's annual base salary of $385,000. App. 8a-9a.

The jury rejected Riseman's claim of age discrimination, but found in his favor on other claims, including retaliation under the ADEA and liability under the WPCL. App. 17a, 47a-48a (verdict form). As to damages, the verdict form specified the total amount awarded ($3,939,126); the amount awarded for "back pay" under the ADEA ($1,377,125); and the amount awarded under the WPCL ($2,562,001). App. 48a-49a.[1] The verdict form does not indicate the specific grounds on which the jury found liability or awarded damages under the WPCL—that is, for which of the three potential bonuses it found Advanta liable, or what amount it attributed to any particular bonus. *Id.* Likewise, the verdict form does not specify how much of the ADEA award reflected bonuses. *Id.*

Advanta objected to the jury's damage award before the jury was discharged. The trial judge overruled the objection, and later denied Advanta's motion for a new trial based on the damage award, in each case on the ground that the high WPCL award could have represented Riseman's performance bonus. *See* App. 27a-29a (post-trial order).

3. The court of appeals reversed in part. App. 1a-12a. As relevant here, the court agreed with Advanta that the trial record conclusively established that Riseman's potential 1998 AMIP bonus could not have exceeded 100% of his base salary, or $385,000. App. 8a-9a. Because the only three items of damage sought by Riseman on his WPCL claim were the 1997 bonus of $650,000, the 1998 conditional bonus of $400,000, and the 1998 AMIP bonus, the maximum total damages under the WPCL amounted to $1,435,000—$1,127,001 less than the jury had awarded. App. 9a.

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[1] Although the verdict form contemplated that the damages to which Riseman was entitled under the WPCL might also have been included in another portion of the award, review of the verdict form reveals that the amounts the jury allocated to ADEA "back pay" and to the WPCL claims together equal the amount of the overall award. App. 49a.

The court nonetheless refused Advanta's request that it remand the case for a new trial. *Id.* Instead, the court declared itself "persuaded by the record that the jury verdict included all three bonuses in awarding the original $2.562 million WPCL award." *Id.* On the basis of that "persua[sion]," the court reduced the WPCL award to $1,435,000, and remanded the case only for recomputation of liquidated damages (which depend on the amount of the underlying award) and entry of judgment on the revised award. App. 9a-10a, 12a.[2]

REASONS FOR GRANTING THE PETITION

This case presents a well-defined and important question under the Seventh Amendment. That question is framed by two circumstances that are clear from the opinion below. First, the jury's damage award with respect to Riseman's contract claims was demonstrably erroneous, because it exceeded the maximum total amount he could have received if he had been awarded each of the three bonuses he claimed. Second, because it is not possible to tell from the verdict form what bonuses the jury found Riseman should have received, or how much of the damage award it attributed to each bonus, the court of appeals' decision to reduce the damage award to the maximum possible amount necessarily rested on a determination *by the court* of what the jury meant to find, or should have found, as to liability and damages with respect to each of the three bonuses. Under these circumstance, the court's order directing the entry of a reduced judgment and denying the defendant's request for a new trial invades the province of the jury and violates the Seventh Amendment.[3]

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[2] The court did not disturb the ADEA award, based in part on hypothetical computations that assume the jury understood and adhered to the same limitation on annual AMIP bonuses that the court concluded the jury disregarded in making its WPCL award. *See* App. 5a.

[3] The constitutional right to a jury trial attaches to any claim that is legal in nature and is tried in federal court, even if the claim arises under

1. Where the effect of an error on liability or damage determinations is clearly ascertainable, an appellate court may properly permit the entry of judgment in a corrected amount, at least with the consent of the aggrieved party. *See, e.g.*, *Hansen* v. *Boyd*, 161 U.S. 397 (1896) (court could "clearly distinguish and separate" erroneous portion of damage award because it was "clearly ascertainable from the evidence contained in the record"); *Northern Pac. R.R.* v. *Herbert*, 116 U.S. 642 (1886) (award could be reduced without need for speculation regarding jury's liability findings). Over a century ago, however, this Court made clear that there must be a new trial—or at least the option of a new trial—where it is impossible to determine how some error infected a jury's verdict. In *Maryland* v. *Baldwin*, 112 U.S. 490 (1884), an heir alleged that the administrators of an estate had not properly discharged their duties. The defendants filed several pleas in response. The jury rendered a general verdict for the defense. This Court held that testimony material to the first defense plea was improperly admitted; but given the general verdict, the Court could not "perceiv[e] upon which plea [the jury] found." *Id.* at 493. Rather than speculating regarding the jury's findings, the court held that "the case must, for this error, go back for a new trial." *Id.* at 494.

The Court addressed similar issues again in *Dimick* v. *Scheidt*, 293 U.S. 474, 486 (1935), which rejected the use of "additur" (as opposed to "remittitur") in the federal courts. A court may not properly enter judgment, the Court emphasized, when doing so would assume a "matter of fact which no jury has ever passed upon either explicitly or by implication." *Id.* at 486-87. While a court should not permit a verdict to stand if it is "palpably and grossly inadequate or excessive," judicial reduction of the award is permissible only on the theory "that what remains is included in the verdict along with the unlawful excess—in the sense that *it has been*

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state law. *See, e.g.*, *Simler* v. *Conner*, 372 U.S. 221, 222-23 (1963) (per curiam).

found by the jury—and that the remittitur has the effect of merely lopping off an excrescence." *Id.* at 486 (emphasis added). In other circumstances—such as with "additur"—the court would be effectively "compel[ling] the plaintiff [or the defendant] to forego his constitutional right to the verdict of a jury and accept 'an assessment partly made by a jury which has acted improperly, and partly by a tribunal which has no power to assess.'" *Id.* at 486-87. In any event, where the original award cannot stand, "both parties remain entitled, as they were entitled in the first instance, to have a *jury* properly determine the question of liability and the extent of the injury by an assessment of damages." *Id.* at 486 (emphasis added); *see also Hetzel* v. *Prince William County*, 523 U.S. 208, 211 (1998) (per curiam) (citing *Dimick* for this proposition).

In *Memphis Community School District* v. *Stachura*, 477 U.S. 299 (1986), the Court held that a new trial was required where the jury was instructed to consider an impermissible element of damages, and the effect of the error on the final award could not be ascertained from the general verdict form. In *Stachura*, the district court instructed the jury to consider compensatory damages for violations of constitutional rights. This Court found, however, that the damages "based on the abstract 'value' or 'importance' of constitutional rights [were] not a permissible element of compensatory damages." *Id.* at 310. Because the general verdict did not specify the grounds on which the jury based its award, and "the effect of the erroneous instruction [was] therefore unknowable, although probably significant," the Court held that a new trial was required. *Id.* at 312-13.

The common premise of these decisions is that a court may not enter judgment on a civil damages verdict, without the parties' consent, if doing so requires speculation about what findings the jury made, or would have made in the absence of some later-recognized error. It does not matter that the same verdict might be supported on some alternative basis. It is the jury, not the court (and certainly not a court of appeals), to which the Constitution commits determinations of fact, including the assessment of damages within proper legal limits. The Court has repeatedly reaffirmed these principles. *See, e.g.*, *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29-30 (1962) (rejecting one of several theories of liability and expressly reaffirming *Baldwin* rule requiring retrial where court is unable to determine theory of liability underlying general verdict); *United N.Y. & N.J. Sandy Hook Pilots Ass'n* v. *Halecki*, 358 U.S. 613, 619 (1959) (new trial required where "there [was] no way to know that the invalid claim . . . was not the sole basis for the verdict").

The court of appeals' decision in this case cannot be squared with this Court's precedents. As set out above, Riseman asserted three bases for liability under the WPCL: the 1997 bonus, the 1998 conditional bonus, and the 1998 AMIP bonus. The evidence showed that even if the jury found Riseman entitled to the maximum possible amount for each bonus, the total award could not have been more than $1.435 million. Accordingly, the court properly held that the jury's $2.562 million award under the WPCL could not stand. Having reached that conclusion, however, the court simply could not know from anything in the record exactly how the jury erred, or what effect its error or errors had on the computation of its undifferentiated award. Nothing in the verdict form (or elsewhere) indicates whether the jury found liability as to each bonus, or what part of its excessive award was based on any particular bonus.

The jury might, for example, have found Advanta liable under the WPCL only for the 1998 AMIP bonus—on which, as noted above, Riseman's counsel focused in closing, arguing (incorrectly) that that bonus alone was worth several million dollars. In that event, "correcting" the jury's verdict to conform to its actual findings on liability would have resulted in a *maximum* award of $385,000, rather than $1.435 million. Or the jury might have found Advanta liable for the 1998 conditional bonus and the 1998 AMIP bonus, but not the 1997 bonus (which was conditioned on a change of control in

Riseman's business unit). In that event, conforming the verdict to the liability findings would have resulted in a maximum award of $785,000—although only on the assumption, which would also have been improper, that all of the excess in the jury's award was attributable to the AMIP bonus. Or perhaps the jury found Advanta liable for all three bonuses, but included the amounts assessed for the 1998 conditional bonus and the 1997 bonus in the award of backpay under the ADEA, while assessing $2.562 million in liability solely on the 1998 AMIP bonus under the WPCL count. Correcting that error would again have led to a reformed WPCL verdict of no more than $385,000.

The examples are easily multiplied, and the point is simple: Although the court of appeals in this case could be certain that the jury erred in awarding damages under the WCPL, it had no way of fashioning a remedy for that error that would *necessarily* be consistent with the jury's actual findings, either as to liability or as to particular elements of damages. Without ordering a new trial, it could do no more than what it did—review the record itself, and make its own determination of what the jury had in mind. *See* App. 9a ("[W]e are persuaded by the record that the jury verdict included all three bonuses in awarding the $2.562 million WPCL award."). But that is not a determination that the Constitution allows a reviewing Court to make. However well- or ill-founded the court's speculation, it invaded the province of the jury, and deprived Advanta of its right to have a jury make findings, within proper legal bounds, as to both liability and damages.

The court of appeals' error is both straightforward and quite clear. In a case a few years ago involving a similar Seventh Amendment issue, the Fourth Circuit directed the reduction of what it considered an excessive verdict for the plaintiff; and then, in an unpublished order, granted the defendant's petition for a writ of mandamus when the district court proposed to allow the plaintiff to retry the case. *See Hetzel*, 523 U.S. at 208-10. This Court summarily reversed.

Id. at 208, 212. The Court's opinion simply noted that, under longstanding precedent, "a court has no authority, upon a motion for new trial, 'according to its own estimate of the amount of damages which the plaintiff ought to have recovered, to enter an absolute judgment for any other sum than that assessed by the jury.'" *Id.* at 211 (quoting *Kennon* v. *Gilmer*, 131 U.S. 22, 29 (1889)); *see also id.* (citing *Dimick* for its conclusion that where a damages verdict is set aside, "both parties remain entitled to have a jury determine the issues of liability and the extent of injury").[4] The same principle dictates the proper outcome of this case. Accordingly, this Court may again wish to consider summary disposition.

2. Alternatively, the Court should grant plenary review in this case to address issues of appellate remittitur that have generated increasing conflict and confusion in the lower courts.

The court of appeals' decision in this case cannot be reconciled with the decision of the Fifth Circuit in *Jamison Co.* v. *Westvaco Corp.*, 526 F.2d 922 (5th Cir.), *reh'g denied*, 530 F.2d 34 (5th Cir. 1976).[5] In *Jamison*, a contract case, the jury returned a $607,000 verdict against the defendant. On appeal, the Fifth Circuit concluded that no "set of calculations with a rational basis in the evidence [could] justify the jury's $607,000 award." 526 F.2d at 932. Although it acknowledged the practice of ordering remittitur when confronted with an excessive award, the court held that the circumstances of the case before it, in which the plaintiff had asserted different claims but the jury had returned only a general verdict, left it "no alternative" but to order a new trial. *See id.* at 934-35 ("[W]ithout knowing whether the jury found for the plaintiff on the 'termination without cause' or on the settlement count, an answer obscured by the general verdict, we cannot calculate the maximum recovery on which to base the remittitur.") (footnote omitted); *see also id.* at 935 n.27 ("[T]he general verdict foreclose[d] ascertainment of the liability basis of the jury's award.").

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[4] *Cf. Donovan* v. *Penn Shipping Co.*, 429 U.S. 648, 649 (1977) (per curiam) (summarily affirming court of appeals' refusal to entertain appeal from plaintiff who had accepted remitted award "under protest," in order to clarify rule in light of other circuit decisions "depart[ing] from [this Court's] unbroken precedents" dating back to *Kennon* v. *Gilmer*).

[5] The decision below is also inconsistent with older authority from the Third Circuit itself. *See Jayne* v. *Loder*, 149 F. 21 (3d Cir. 1906).

As the Fifth Circuit reiterated in denying a petition for rehearing, *Jamison* holds that when a jury verdict is excessive, but it is impossible "to determine the theory of liability on which the jury premised its overly generous verdict," an appellate court must order a new trial. 530 F.2d at 34. That holding succinctly describes the circumstances of this case. Yet, rather than conceding its inability to "ascertain[] the liability basis of the jury's award," 526 F.2d at 935 n.27, and granting Advanta's request for a new trial, the Third Circuit in this case examined the record and "persuaded" itself of what the jury intended to include in its verdict. App. 9a. This case would have been decided differently in the Fifth Circuit.

More generally, in *Lin* v. *McDonnell Douglas Corp.*, 742 F.2d 45 (1984), the Second Circuit explained that the courts have come to use remittitur in at two basic situations: "(1) where the court can identify an error that caused the jury to include in the verdict a quantifiable amount that should be stricken, and (2) more generally, where the award is 'intrinsically excessive' in the sense of being greater than the amount a reasonable jury could have awarded, although the surplus cannot be ascribed to a particular, quantifiable error." *Id.* at 49 (citations omitted). In the second type of case, the court observed, "courts have developed conflicting rules about how to compute" the amount of the award that should be remitted, with some reducing the award to the maximum a reasonable jury could have awarded, some to what they think a reasonable jury would have awarded, and some to the minimum result a reasonable jury could have reached. *Id.* at 49-50. The court did not pursue that issue, because it determined that in the case before it—in which the plaintiff had accepted a remitted award, but the defendant had appealed and sought a new trial—the errors at trial had "infected the jury's entire consideration of plaintiff's pecuniary loss." *Id.* at 50. Relying on *Dimick* and other cases, the court reasoned that where the nature of the errors did not allow the court to "start[] with the jury's verdict and cut[] it down" to a more reasonable amount, but instead effectively required the court to "calculate the damages from zero and build up," judicial adjustment of the award was impermissible because it would "disregard[] the jury's verdict entirely and deprive[] the defendants of their right to trial by jury." *Id.*

That reasoning is inconsistent with the court of appeals' decision in this case. The court below purported to do nothing more than reduce an excessive verdict. But although this case involved jury error in assessing quantifiable contract damages, rather than "intrinsically excessive" tort-type damages, the court had no way to ascertain from the record the information necessary to identify any "quantifiable amount that should be stricken" from the award in order to conform it both to the law and to the jury's actual findings. *See id.* at 49. Unlike in a case involving an "intrinsically excessive" verdict, the court of appeals in this case was forced to speculate about what grounds of liability the jury must have embraced, and how much it must have intended to award on each such ground. The court's judgment thus amounted, in effect, to "calculat[ing] the damages from zero and build[ing] up"—thus "disregard[ing] the jury's [actual] verdict entirely and depriv[ing] the defendants of their right to trial by jury." *Id.* at 50.[6]

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[6] *See also Westbrook* v. *General Tire & Rubber Co.*, 754 F.2d 1233 (5th Cir. 1985) (remittitur inappropriate where closing argument's improper appeal to excessive damages prejudices jury's entire damages consideration). As noted above, in this case Riseman's counsel argued in closing that the jury should award him millions of dollars solely on the basis of the 1998 AMIP bonus.

Over time, other courts of appeals have proven quite aggressive in their approach to remittitur—although in most instances such decisions, unlike the Third Circuit's, afford at least one party the option of demanding a new trial, rather than accepting the remitted award.[7] In *Kropp* v. *Ziebarth*, 601 F.2d 1348, 1354-55 (1979), for example, the Eighth Circuit concluded that some of the damages evidence "was highly excessive and [might] well have confused the jury," and that the nature of the verdict made it impossible to determine the effect of the identified errors. In light of "the case's complexity, the already large record and the length of time that has transpired since the events in question," however, the court nonetheless directed the district court to propose a remittitur based on the appellate court's own "estimate" of the effect of the errors—conditioned on acceptance by one party, but not the other. *Id.* at 1355. Similarly, in *Deakle* v. *John E. Graham & Sons*, 756 F.2d 821, 827-34 (11th Cir. 1985), the Eleventh Circuit agreed with the defendant that the jury's award of $400,000 for future wages was excessive, and lamented both the state of the record and that "[a]ll too often appellate courts are saddled with the task of correcting mistakes in damage awards caused by inattentive litigants at trial." *Id.* at 834. But rather than remand the case for retrial of the damages question to the jury on proper evidence and instructions, the appellate court itself conducted a complete re-examination of the trial evidence, filled in evidentiary gaps, and computed a formula to be applied in determining a remitted verdict—conditioned on acceptance by the plaintiff, but not by the defendant. *See id.* at 827-34, 834.

These are just a few example of cases in which courts of appeals have embraced judicial recalculation of damages, based on re-examination of the evidence from the remote appellate perspective. These cases often inappropriately hold or assume—as the court of appeals in effect did in this case—that the court should "independently determine the *maximum possible award* that is reasonably supported by the evidence in the record." *Id.* at 827 (emphasis added); *see* App. 9a.[8] Moreover, they ignore the fact that under the Seventh Amendment and *Dimick*, the defendant has the same right as the plaintiff to have the jury, not a reviewing court, decide disputed factual issues.

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[7] Giving a plaintiff the option to accept a reduced award does not, of course, cure any violation of the *defendant's* independent constitutional right to have a jury determine both liability and damages. *See Dimick*, 293 U.S. at 486 ("*both* parties remain entitled . . . to have a jury properly determine the question of liability and the extent of the injury").

These issues concerning the appropriate or inappropriate use of remittitur by the courts of appeals are intrinsically important, because of the challenge they pose to the Seventh Amendment rights of parties—and particularly defendants—in federal courts. They are also of increasing practical importance, as appellate remittitur becomes more and more common. *See generally* Eric Schnapper, *Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts*, 1989 Wis. L. Rev. 237; Irene Deaville Sann, *Remittiturs (and Additurs) in the Federal Courts: An Evaluation With Suggested Alternatives*, 38 Case Western L. Rev. 157 (1987). Often, moreover, as in the present case, appellate courts couch their adjustments to jury verdicts in conclusory terms that may discourage further review. *Cf.* Sann, *supra*, 38 Case Western L. Rev. at 197 & n.164. This case presents an appropriate vehicle for this Court to offer a much-needed reaffirmation of the central Seventh Amendment principle that a federal court may not simply adjust a jury's award of damages. That principle applies with particular force in a case such as this one. The jury's verdict is demonstrably erroneous; and the effect of those errors cannot be precisely determined and corrected in any way that ensures that every aspect of the final judgment, as to liability and as to damages, rests firmly on findings actually made by the jury itself.

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[8] *See also, e.g., Skalka* v. *Fernald Envtl. Restoration Mgmt. Corp.*, 178 F.3d 414, 424-27 (6th Cir. 1999) (directing district court to calculate remittitur reflecting court of appeals' assessment of where jury might have erred in assessing and allocating damages in ADEA/contract case); *K-B Trucking Co.* v. *Riss Int'l Corp.*, 763 F.2d 1148, 1159-63 (10th Cir. 1985) (directing district court to enter remittitur order based on court of appeals' assessment of maximum award sustainable under evidence concerning fraud and lost profits); *Kolb* v. *Goldring, Inc.*, 694 F.2d 869 (1st Cir. 1982) (directing new trial unless plaintiff agrees to accept reduced award based on court's recalculation of ADEA damages to determine "upper limit of a justifiable sum").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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DECEMBER 2002

APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 01-1307 / 01-3844

MILTON RISEMAN,
Cross-Appellant,

v.

ADVANTA CORP., ADVANTA MORTGAGE CORPORATION, U.S.A., WILLIAM ROSOFF, ESQUIRE, DENNIS ALTER AND OLAF OLAFSSON

*ADVANTA CORP. AND ADVANTA MORTGAGE CORPORATION, U.S.A.,
Appellants.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 98-CV 6671)
District Judge: Honorable Anita B. Brody

Argued: Tuesday, June 25, 2002

Before: ALITO, AMBRO and GARTH, Circuit Judges
(Opinion Filed: July 8, 2002)

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* * * *

OPINION OF THE COURT

Garth, Circuit Judge:

This appeal from a jury verdict was brought by defendants Advanta Corp. and its wholly owned subsidiary, Advanta Mortgage Corp., U.S.A. (together, "Advanta"), with a cross-appeal by plaintiff Milton Riseman ("Riseman"). For the following reasons, we will affirm the District Court's September 7, 2001 judgment, except that we will reduce Riseman's damages under the Pennsylvania Wage Payment and Collection Law, 43 P.S. 260.1 *et seq.* (the "WPCL"), from $2,562,001 to $1,435,000. Consequently, the jury's total damage award will be reduced by $1,127,001, and the District Court's award of liquidated damages under the WPCL, which had been calculated at the higher figure, will be vacated and remanded to the District Court for recalculation based upon the new WPCL damage figure of $1,435,000.

I.

Riseman had been employed by Advanta Mortgage Corp. as a senior executive for roughly six years, during which time he was compensated by a substantial salary and various bonuses.[1] The facts of this matter are well-known to the parties and explored in detail in the record, and do not warrant re-telling here. Suffice it to say, after Riseman's employment was terminated in the latter part of 1998, Riseman brought suit in the Eastern District of Pennsylvania against Advanta and certain senior executives of Advanta—William Rosoff, Dennis Alter and Olaf Olafsson (the "Individual Defendants")—alleging, *inter alia*, age discrimination under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (the "ADEA"), retaliation under the ADEA, violations of the WPCL, breach of contract, detrimental reliance, fraud and negligent misrepresentation.

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[1] Riseman's starting salary in 1992 was $200,000 per year, which rose to $385,000 in 1998. In addition to salary, Advanta's practice was to award performance bonuses under Advanta's Management Incentive Program ("AMID"). These AMIP bonuses were calculated by reference to an assigned yearly "target" bonus, from which the recipient could receive a higher or lesser amount. In this action, Riseman sought his 1998 AMIP bonus, a $400,000 bonus offered in 1998 (the "1998 Retention Bonus"), and a $650,000 change of control bonus offered in 1997 (the "1997 Change of Control Bonus") under the WPCL.

On October 23, 2000, the District Court partially granted a motion for summary judgment brought by the defendants. Pursuant to the court's rulings, a number of claims no longer relevant here were dismissed, but the following claims survived against Advanta for trial: (1) age discrimination; (2) retaliation; (3) violations of the WPCL; (4) breach of contract; (5) detrimental reliance; (6) fraud; and (7) negligent misrepresentation. In addition, the following claims were to be tried against the Individual Defendants: (1) detrimental reliance; (2) fraud; and (3) negligent misrepresentation.

The jury trial of Riseman's claims was lengthy and detailed, commencing on November 14, 2000 and continuing through December 4, 2000. Pursuant to the defendants' Rule 50 motion at the close of Riseman's evidence,[2] the District Court entered judgment in favor of the Individual Defendants on all claims, and in favor of Advanta on the fraud and negligent misrepresentation claims. The remaining claims reached the jury for determination.

On December 5, 2000, the jury returned a verdict for Advanta on the age discrimination claim, but in Riseman's favor on retaliation, violations of the WPCL, breach of contract and detrimental reliance, awarding a total of $3,939,126 in damages to Riseman. The jury's award was broken down into two components: back pay under the ADEA retaliation claim for $1,377,125, and damages under the WPCL claim for $2,562,001. The jury further found that

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[2] Riseman contends that Advanta failed to renew its Rule 50 motion at the close of all evidence, and that, as a result, it has waived its sufficiency of the evidence arguments on appeal. Upon review of the record, however, we hold that Advanta did, in fact, renew its motion at sidebar and that the District Court informed counsel for both Riseman and Advanta that they did not need to argue their respective motions. *See* Joint App. at 3320. Accordingly, Advanta has not waived its sufficiency of the evidence arguments.

Advanta's violation of the ADEA was "wilful" and that there "was no good faith basis" to deny Riseman's earned wages under the WPCL.

In September 2001, the District Court rejected the parties' post-verdict motions and entered a final judgment in favor of Riseman for $6,071,783.25. This larger award reflected statutory enhancements for liquidated damages under the ADEA and the WPCL, and included prejudgment interest on Riseman's back pay award.

II.

A.

Advanta raises a multitude of issues on appeal. In connection with the retaliation claim, it argues that because Advanta contemplated discharging Riseman prior to the alleged protected activity (Riseman's August 17, 1998 letter, which raised allegations of age discrimination), Riseman failed to prove at trial that there was a causal connection between that activity and Riseman's termination. Advanta also contends that even if such a causal connection were shown, the jury's damage verdict is excessive and not supported by the record.

We have carefully examined the entire record; we have heard oral argument; and we have reviewed the contentions and the exhibit presented by Advanta, as well as the contentions of Riseman. We are satisfied that the jury's finding of retaliation and its award for back pay were appropriate.

As an initial matter, the jury was entitled to believe that Advanta did not decide to terminate Riseman until after the August 17, 1998 letter was received, thereby inferring a causal link between the protected activity and the termination. Indeed, on August 18, 1998—in response to Riseman's letter—Advanta's counsel wrote that "[n]otwithstanding [Riseman's] rejection of the offer, Mr. Riseman *remains employed by the Company*." It was only after Riseman returned to work later that day that Rosoff told

Riseman to "go home." While Advanta advances different interpretations of its August 18th letter, the jury was entitled to believe that Advanta made its decision to terminate Riseman as a result of his August 17th letter.

Moreover, we reject Advanta's contention that the ADEA back pay award of $1,377,125 was excessive. In reaching that amount, the jury could have, on this record, calculated Riseman's back pay in the following manner. First, at a salary of $385,000 per year in 1998, the jury could have awarded roughly $80,000 to Riseman for the remaining two and a half months of 1998 for which he was not paid. Second, because Riseman received a 20% raise in salary from 1997 to 1998, the jury could have contemplated similar increases in 1999 and 2000, bringing his annual salary in those years to $462,000 and $554,400, respectively. Third, given those salaries, the jury could have also awarded maximum AMIP bonuses for 1999 and 2000—which, for reasons discussed below, were limited to 100% of base salary—to provide an additional $462,000 for the 1999 AMIP bonus and $554,400 for the 2000 AMIP bonus. Consequently, the jury could have concluded that Riseman would have made a total of roughly $2,112,800 at Advanta from October 1998 to December 2000.

In addition, the record shows that Riseman's new position at American Financial Business commenced in June 1999 at a rate of $335,000 until October 20, 2000, at which time he received a raise to $350,000 per year. It was also established that Riseman received his first bonus of $100,000 shortly prior to trial. Accordingly, the jury could have concluded that Riseman's mitigation of damages from October 1998 to December 2000 was roughly $600,000.

Consequently, under this *one* hypothetical calculation, the jury could have awarded Riseman back pay damages of approximately $2,112,800 minus mitigation of damages of $600,000, to arrive at $1,512,800—well over the $1,377,125 actually awarded by the jury in back pay. *See, e.g., Scully v.*

U.S. Wats. Inc., 238 F.3d 497, 515 (3d Cir. 2001) ("The law does not command mathematical preciseness from the evidence in finding damages. Instead, all that is required is that sufficient facts ... be introduced so that a court can arrive at an intelligent estimate without speculation or conjecture.") (internal quotations omitted). As the District Court noted, other hypothetical calculations could have been derived also justifying the jury's $1.3 million back pay award.

As a reviewing court, it is not our function to substitute our judgment for that of the jury. Accordingly, since we have identified a sound basis for arriving at the jury's ADEA damage award, we will affirm the jury's back pay amount of $1,377,125, as well as the District Court's award of prejudgment interest on this amount.[3] Moreover, in light of the jury's finding of a "wilful" violation of the ADEA, we will also affirm the District Court's award of liquidated damages awarded under that statute. *See* 29 U.S.C. § 626(b).

B.

With regard to the WPCL claim, Advanta contends that the District Court should have entered judgment as a matter of law in its favor, principally for three reasons. First, Advanta argues that all three bonuses sought by Riseman under the WPCL—the 1998 Retention Bonus, the 1997 Change of Control Bonus and the 1998 AMIP bonus—were satisfaction contracts subject to Advanta's discretion and that

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[3] Significantly, the jury's back pay award is justified without taking into account any recovery for the 1998 AMIP bonus amount sought by Riseman under his WPCL claim, or, for that matter, any of the other bonuses sought by Riseman under his WPCL claim. Together with the fact that the District Court instructed the jury numerous times not to award the same damages twice in calculating the ultimate damage award to Riseman, we reject Advanta's contention that there was double-counting between the jury's AREA award and its WPCL award. *See, e.g., Loughman* v. *Consol-Pennsylvania Coal Co.*, 6 F.3d 88, 102 (3d Cir. 1993) ("We must assume that the jury followed the court's instructions and arrived at a verdict based on the instructions.") (internal quotations omitted).

Riseman failed to show he satisfied the conditions required by any of the bonuses. Second, Advanta asserts that the 1998 Retention Bonus and the 1998 AMIP bonus could not have been "earned" under the WPCL, and therefore are not recoverable under that statute. Third, Advanta contends that all three bonuses were gratuitous promises and are unenforceable as a matter of law. Alternatively, Advanta argues that even if the jury were entitled to award Riseman the three bonuses, it should be permitted a new trial because the $2,562,001 WPCL award is excessive and not supported in the record.

Upon careful review of the record, we conclude that the jury was entitled to believe that Riseman satisfied all of the conditions necessary to receive each of the three bonuses, and also that *Advanta itself* believed that Riseman satisfied all of the conditions to receive the three bonuses. Indeed, this conclusion is consistent with the jury's specific finding that Advanta "had no good faith basis" to deny Riseman the bonuses he sought under the WPCL.[4]

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[4] In this way, we also reject Advanta's contention that it is entitled to a new trial because the District Court erred in instructing the jury. Advanta contends that its discretion in determining whether Riseman was sufficiently flexible and cooperative to receive the 1998 Retention Bonus was subject only to a "good faith" standard rather than the more stringent "reasonableness" standard as charged by the District Court. Assuming, without deciding, that the District Court's instruction were erroneous, it is evident that the jury—in light of this record—would have found against Advanta even if Advanta's requested "good faith" instruction were given, particularly since the jury specifically concluded that Advanta lacked any "good faith" basis to withhold Riseman's bonus. In this way, such an erroneous instruction would have been harmless. *See Pivirotto v. Innovative Systems, Inc.*, 191 F.3d 344, 357 (3d Cir. 1999) ("Although we hold that the jury instruction challenged in this case was erroneous, we can affirm the judgment in ISI's favor if that error was harmless."); *Murray v. United of Omaha Life, Ins. Co.*, 145 F.3d 143, 156 (3d Cir. 1998) (noting that an error is harmless if "it is highly probable that the error did not contribute to the judgment") (internal quotations omitted).

Similarly, the evidence and testimony adduced at trial supports the conclusion that the 1998 Retention Bonus and the 1998 AMP bonus could have been fully earned by Riseman prior to his termination, and that Advanta legally obligated itself to pay such bonuses to Riseman by the time of his termination. *See* 43 P.S. §§ 260.3.(b) & 260.5(a); *Weldon v. Kraft. Inc.*, 896 F.2d 793, 801 (3d Cir. 1990). The mere fact that certain compensation is not payable until a future date is not necessarily fatal to a WPCL claim so long as the employee is deemed to have "earned" it during his employment. *See, e.g., Scully*, 238 F.3d at 516 (holding that although the employee was terminated before he was able to exercise his stock options, the employee's stock options constituted "earned" compensation within the meaning of the WPCL, and the employer therefore violated the WPCL when it refused to honor employee's attempts to exercise those options).

Further, we reject Advanta's suggestion that the bonuses were unenforceable promises. With regard to the 1998 Retention Bonus and the 1997 Change of Control Bonus, there was sufficient evidence presented at trial for the jury to have concluded (which it did) that the traditional indices of a binding contract—offer, acceptance and consideration—were present. In any event, the jury was entitled to conclude (which it did) that Riseman detrimentally relied upon these bonuses. With regard to the 1998 AMIP bonus, once the jury concluded that Riseman sufficiently earned that bonus prior to his termination—which, as discussed above, the jury was entitled to do—Advanta was required to pay that bonus under the WPCL.

Notwithstanding the above, we agree with Advanta's contention that the jury's $2,562,001 WPCL award was excessive. Riseman's own testimony at trial, coupled with his expert's testimony, established that Riseman's 1998 AMIP bonus was limited to 100% of his base salary, or $385,000.[5] Because Riseman's WPCL claim consisted only of the 1998 Retention Bonus ($400,000), the 1997 Change of Control Bonus ($650,000) and the 1998 AMIP bonus (limited to $385,000), the maximum damage award the jury could have provided under the WPCL was $1,435,000. Consequently, the jury's $2,562,001 award was $1,127,001 greater than what was supported by the record.

Accordingly, we will reduce the jury's $2.562 million WPCL award to $1,435,000. Because we are persuaded by the record that the jury verdict included all three bonuses in awarding the original $2.562 million WPCL award, we reject Advanta's contention that the jury's error requires a remand for a new trial with regard to the three bonuses under the WPCL. Moreover, as discussed in note 3, *supra*, because there is no overlap between the WPCL and the ADEA damage awards, we also reject Advanta's contention that this error requires a new trial on the retaliation claim.[6]

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[5] In fact, Riseman's own summary judgment opposition papers—which were not before the jury at trial—conceded that his AMIP bonus was limited to 100% of his base salary.

[6] Similarly, we are not persuaded by Advanta's remaining arguments. First, we need not address Advanta's contention that the jury's total damage award improperly contained front pay, because front pay was simply not awarded by this jury. The jury's $1,377,125 ADEA award, by its own terms, consisted entirely of back pay. Moreover, the WPCL award consisted only of the three bonuses discussed above, none of which can be characterized as front pay. Second, we reject Advanta's suggestion that the jury's award may have contained amounts for severance pay. All sides agree that Riseman withdrew any claim he may have had for severance payments before the issues were given to the jury. In any event, as discussed above, the jury's ADEA and WPCL awards are sustainable without reference to severance payments. Finally, we are not persuaded by Advanta's argument that the District Court's award of liquidated damages under the ADEA and the WPCL constituted a double penalty. As already discussed, the jury's awards under both claims did not overlap with one another in any way, and, therefore, the District Court's assessment of liquidated damages based upon those awards do not constitute a double penalty. Indeed, under the facts of this particular

Because we will reduce the jury's WPCL award, we will also vacate the District Court's issuance of liquidated damages of $640,500.25 under the WPCL, and remand only that issue to the District Court for recalculation based upon the reduced WPCL award.

III.

A.

In his cross-appeal, Riseman argues that the District Court erroneously granted judgment as a matter of law in favor of all defendants on the fraud and negligent misrepresentation claims, contending that the jury was entitled to consider whether he was improperly induced into remaining at Advanta when it promised him the 1998 Retention Bonus and the 1997 Change of Control Bonus but failed to pay them.

Upon review of the record, however, we reject Riseman's contention. While Pennsylvania law recognizes claims for fraud where the defendants' misrepresentations cause the plaintiff to refrain from acting, *Smith v. Renaut*, 387 Pa. Super. 299, 305 (Pa. Super. 1989), Riseman failed to present any evidence at trial that he sought employment outside of Advanta during the relevant time period, or that alternative employment was available or desirable.[7]

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case, the two damage awards at issue here (the ADEA award and the WPCL award) address different conduct by Advanta—one for illegal termination based upon unlawful retaliation against Riseman for protected activity, and one for simply failing to pay Riseman what he had earned at Advanta while he was employed there.

[7] Although *Riseman* never introduced evidence that he looked for other employment, *Advanta* sought to introduce testimony that Riseman may have looked for a job in California in June 1998 to undercut his detrimental reliance claims. In light of its Rule 50 ruling as to the fraud and misrepresentation claims, the District Court did not admit such evidence as it became irrelevant. In a footnote at the end of its opening brief, Advanta, asserts—without explanation—that the District Court's decision to exclude this testimony was erroneous and that it provides a ground for a new trial on all issues. As we cannot agree that the exclusion

Moreover, there is no evidence suggesting that Riseman would have left Advanta but for the promises made to him in 1997 and 1998.

Accordingly, we will affirm the District Court's judgment in favor of the defendants on the fraud and negligent misrepresentation claims.

B.

Riseman also contends that the District Court's ruling granting the Individual Defendants judgment as a matter of law with regard to the detrimental reliance claims should be reversed. However, all of the evidence presented at trial showed that the bonuses offered to Riseman by Advanta's executives were offered in their capacities as corporate officers and not in their personal capacities. Riseman points to nothing in the record to demonstrate that the Individual Defendants did anything to assume Advanta's liability personally. *See, e.g., B&L Asphalt Ind. Inc. v. Fusco*, 753 A.2d 264, 270 (Pa. Super. 1997) ("[I]t is a basic tenet of agency law that an individual acting as an agent for a disclosed [principal] is not personally liable on a contract between the [principal] and a third party unless the agent specifically agrees to assume liability.") (internal quotations omitted).

Accordingly, we will affirm the District Court's ruling in favor of the Individual Defendants on the detrimental reliance claim.

IV.

For the foregoing reasons, we will affirm the jury's verdict and damages for retaliation under the ADEA in the amount of $1,377,125 in back pay. We will also affirm the District Court's award of liquidated damages under the ADEA doubling the jury's back pay award. Similarly, the

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of this evidence by the District Court was an abuse of discretion, we reject Advanta's argument in this regard.

District Court's award of prejudgment interest on Riseman's ADEA back pay award will be affirmed.

As to the jury's WPCL award, however, we will reduce the jury's award from $2,562,001 to $1,435,000, a reduction of $1,127,001. As a consequence and because the District Court's liquidated damages calculation was based on the higher jury verdict, we are obliged to vacate and remand to the District Court for a recalculation of the liquidated damages on the revised amount of $1,435,000. Upon completion of this task, a new judgment shall be entered by the District Court in accordance with this opinion. The remand which we order is limited only to the recalculation of liquidated damages under the WPCL.

We will also affirm the District Court's judgment in favor of all defendants on the fraud and negligent misrepresentation claims, as well as its judgment in favor of the Individual Defendants on the detrimental reliance claim.

TO THE CLERK:

Please file the foregoing opinion.

By the Court,

/s/ Leonard I. Garth
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MILTON RISEMAN	:	
v.	:	98-CV-6671
ADVANTA CORP., et al.	:	

EXPLANATION AND ORDER

On December 5, 2000, a jury awarded plaintiff Milton Riseman $3,939,126 in damages against his former employer, Advanta Corporation and Advanta Mortgage Corporation, USA ("Advanta"). The jury determined that Advanta was not liable for age discrimination against Riseman, a 62 year-old executive, but that it had retaliated against him in violation of the Age Discrimination in Employment Act. The jury also found Advanta liable for breach of contract, detrimental reliance, and violation of the Pennsylvania Wage Payment and Collection Law.

Advanta now moves for judgment as a matter of law and for a partial new trial. Riseman moves for a partial new trial on other grounds. The motions will be denied.

I. FACTUAL BACKGROUND

In 1992, Advanta hired Riseman from Citibank. (11/14/00 at 57-60, 68-69). In 1994, Riseman was promoted to President and CEO of Advanta Mortgage Corporation, USA ("Advanta Mortgage"). (11/14/00 at 60).[1] From 1992 to 1997, Riseman's performance was well received, and he was credited with having saved, turned around, and built the mortgage unit. (P-51-54; P-116; 11/14/00 at 105-125; 11/17/00 at 64-65; 11/20/00 at 61-63, 87-88; 11/21/00 at 47-65; 11/29/00 at 80).

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[1] At the time of trial, Advanta Mortgage was a wholly-owned subsidiary of Advanta Corporation. (11/14/00 at 68; 12/1/00 at 164-67).

In April 1997, Advanta was examining strategic alternatives, including a potential sale of all or a part of its business. (11/17/00 at 66). To further the strategic initiative, Advanta offered bonus opportunities to more than 50 key management employees. (P-132; 11/17/00 at 123-24). In a letter dated April 28, 1997, Chairman Dennis Alter offered Riseman a bonus equal to 200% of his base salary. This "1997 bonus" would be paid in the event of a "change of control affecting your group." According to the letter, Alter had "sole discretion" to determine whether Riseman satisfied the bonus conditions. Below his signature, Alter Wrote: "Milt, Thanks for Being A Total Mench During This Process. D." (P-46; 11/17/00 at 64-66, 118-19).[2]

In October 1997, Advanta announced an agreement with Fleet Financial Group, pursuant to which Fleet would acquire Advanta's consumer credit card business. (P-212). When the deal closed in February 1998, Advanta Mortgage emerged as Advanta's most critical business unit, accounting for 85% of the entire corporation's revenues, assets and profits. (P-8 P-251; 11/20/00 at 6, 87-88; 11/21/00 at 47-65). Given the sudden spotlight on the mortgage unit, the "Office of the Chair" exercised closer scrutiny over Riseman and Advanta Mortgage. (11/14/00 at 126, 145-47; 11/17/00 at 138, 142; 11/27/00 at 103; 11/29/00 at 129).[3]

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[2] According to Webster's Ninth New Collegiate Dictionary, "mensch" means a "person of integrity and honor." (P-278). During the strategic process, Riseman had helped BT Wolfensohn to evaluate various possible transactions. (11/14/00 at 128-29).

[3] The "Office of the Chair" consisted of Advanta Chairman Dennis Alter, Vice-Chairman William Rosoff, and President Olaf Olafsson. Riseman reported to the Office of the Chair. (11/14/00 at 140, 144).

Advanta did not award Riseman the 1997 bonus. (11/17/00 at 65-66). However, Advanta did award the bonus to 54 employees who were transferred to Fleet, and at least 13 employees whose business units did not experience a change of control. (11/14/00 at 132; 11/17/00 at 120, 138-66). Dennis Alter and William Rosoff remained at Advanta and each received $5 million bonuses. (11/17/00 at 141-42; 12/1/00 at 61-65). Elizabeth Mai, who also remained at Advanta, received a $1.5 million bonus. (11/17/00 at 139; 11/28/00 at 9; 11/29/00 at 226-27).

In March 1998, Alter orally extended Riseman another bonus opportunity, the "1998 bonus." (11/14/00 at 145-51). On May 12, 1998, the verbal promise was memorialized. According to the terms of the memorandum, Riseman would receive $400,000 on March 31, 1999, subject to three conditions: (1) exercising "flexibility and cooperation," (2) keeping the arrangement "confidential," and (3) "being here at the time." The Office of the Chair would determine whether Riseman fulfilled these criteria. (P-48).

On a yearly basis, Advanta also awarded Advanta Management Incentive Program ("AMIP") bonuses to key executives, including Riseman. (11/14/00 at 149). These bonuses were for an unliquidated amount, based upon the executive's individual performance and the performance of his business unit. The AMIP bonus could be earned by, and was paid to, executives who did not remain employed for the entire year. (11/17/00 at 14-15).

On August 3, 1998, Advanta informed Riseman that he was being replaced with a 42 year-old as President and CEO, but that he could stay on as "Chairman" of Advanta Mortgage. (11/14/00 at 64-66, 159-61). Advanta promised Riseman the same salary and bonus opportunities he enjoyed as President and CEO. (11/14/00 at 161). Riseman accepted the Chairman position and was relocated to the executive suite of Advanta's corporate headquarters. (11/14/00 at 163-65; 11/16/00 at 10-15).

After three days under the new arrangement, Riseman concluded that the Chairman position was not a "real" job. (11/14/00 at 166-67; 11/16/00 at 15-16). On August 16, 1998, Riseman met with Vice-Chairman William Rosoff to voice his grievances. (11/16/00 at 19-20). On August 17, 1998, Riseman consulted Fred Blume, an attorney with Blank, Rome, Comisky & McCauley LLP. (11/15/00 at 3-6). In a letter of August 17, 1998, Riseman's attorney threatened Advanta with age-discrimination charges. (P-55; 11/15/00 at 7-8). In a letter response dated August 18, 1998, Advanta's counsel denied the charges, but promised that "Mr. Riseman remains employed by the company." (P-56; P-57; 11/15/00 at 9-12). On that same day, Rosoff told Riseman to "go home," and not to report to work. (11/14/00 at 66-67; 11/15/00 at 11-13).

After August 18, 1998, Riseman performed essentially no further services for Advanta. (11/16/00 at 31-32). On August 28, 1998, Advanta published an internal newsletter advising its employees that Riseman had resigned his position as Chairman. (P-58). On September 2, 1998, Riseman filed formal charges of age discrimination with the Equal Employment Opportunity Commission. (11/14/00 at 67). On October 23, 1998, Advanta sent Riseman a letter informing him that he was being separated from the payroll. (P-60).

There was no evidence that Riseman received any alternative offer of employment during or immediatcly following his separation from Advanta. After approximately eight months without full-time employment, Riseman accepted a new job with lower salary and inferior bonus opportunities. (11/14/00 at 63; 11/15/00 at 90). Riseman never received the 1997 bonus, the 1998 bonus, the 1998 AMIP bonus, or any severance pay from Advanta.

On December 23, 1998, Riseman filed a complaint in federal district court. Among other things, the Complaint and Amended Complaint alleged age discrimination and retaliation under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, breach of contract, detrimental reliance, fraud, negligent misrepresentation, and violation of the Pennsylvania Wage Payment and Collection Law ("WPCL"), 43 P.S. § 260.1 *et seq.* After two years of acrimonious litigation, the case went to trial. From November 14, 2000 to December 4, 2000, an attentive jury evaluated the evidence supporting Riseman's claims.

At the close of plaintiffs evidence, the defendants moved for judgment as a matter of law. The motion was granted in favor of all defendants on Riseman's fraud and negligent misrepresentation claims. With respect to detrimental reliance, judgment was granted to the individual defendants, Dennis Alter, William Rosoff, and Olaf Olafsson. The motion was denied as to all other claims.

On December 5, 2000, the jury returned its verdict. The jury found Advanta liable for retaliation under the ADEA, breach of contract, detrimental reliance and violation of the WPCL, but not liable for age discrimination. In response to special interrogatories, the jury determined that the ADEA violation was "willful," and that Advanta had no "good faith" basis to withhold Riseman's wages. The jury awarded total damages of $3,939,126, including $1,377,125 in ADEA "back pay" and $2,562,001 under the WPCL. Judgment was entered accordingly on December 7, 2000.

II. Discussion

Advanta moves for judgment as a matter of law and for a new trial with respect to all claims on which the jury found against it at trial. Riseman requests a new trial for all claims on which he did not prevail. The motions will be denied.

As a preliminary matter, there is a strong argument that Advanta waived the right to renew its motion for judgment as a matter of law, or to challenge the sufficiency of the evidence in any way. Failure to move for a directed verdict at the close of *all* evidence forecloses the defendant from renewing a Rule 50 motion after the verdict has been rendered. *See Greenleaf v. Garlock, Inc.*, 174 F.3d 352, 364-65 (3d Cir. 1999); *Beebe v. Highland Tank & Mfg. Co.*, 373 F.2d 886, 888 (3d Cir. 1967). In addition, failure to move for a directed verdict at the close of all evidence "wholly waives the right to mount any post-trial attack on the sufficiency of the evidence." *Yohannon v. Keene Corp.*, 924 F.2d 1255, 1262 (3d Cir. 1991); *see also Gebhardt v. Wilson Freight Forwarding Co.*, 348 F.2d 129, 132 (3d Cir. 1965), Advanta moved for judgment as a matter of law after Riseman rested his case, but did not specifically renew that motion at the close of all evidence. However, there is some indication in the record that Riseman's counsel and the Court may have implicitly understood Advanta's counsel to have renewed the motion. (12/4/00 at 129-32). Therefore, I will not find that Advanta has waived its right to mount a post-trial attack. *Cf. Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 183-84 (3d Cir. 1992); *Keith v. Truck Stops Corp.*, 909 F.2d 743, 744 (3d Cir. 1990); *Acosta v. Honda Motor Co.*, Ltd., 717 F.2d 828, 831-32 & n.3 (3d Cir. 1983).

A. ADVANTA'S MOTION FOR JUDGMENT AS A MATTER OF LAW

Pursuant to Federal Rule of Civil Procedure 50, Advanta renews it motion for judgment as a matter of law. Judgment as a matter of law is appropriate only where the record is "critically deficient of that minimum quantum of evidence from which a jury might reasonably afford relief." *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1095 (3d Cir. 1995); *Dunn v. Hovic*, 1 F.3d 1362, 1364 (3d Cir. 1993); *Limbach Co. v. Sheet Metal Workers Int'l Ass'n, AFL-CIO*, 949 F.2d 1241, 1261 (3d Cir, 1991) (*en banc*). A court must review the record in the light most favorable to the verdict winner, resolving all conflicts in the evidence in his favor. *See Williamson v. Consolidated Rail Corp.*, 926 F.2d 1344, 1348 (3d Cir. 1991). After giving the prevailing party the benefit of every fair and reasonable inference, the motion must be denied unless the evidence is insufficient to support the verdict. *See Blum v. Witco Chemical Corp.*, 829 F.2d

367, 372 (3d Cir. 1987); *Laskaris v. Thornburgh*, 733 F.2d 260, 264 (3d Cir. 1984).

(1) ADEA Retaliation

The jury found Advanta liable for retaliation under the ADEA. *See* 29 U.S.C. § 623(d). In its motion for judgment as a matter of law, Advanta claims that the jury could not have concluded that Advanta took *any* adverse employment action against Riseman after he had engaged in protected activity. Advanta insists that all adverse employment decisions were made and communicated to Riseman before he asserted an age-discrimination complaint. *See Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980) (statute of limitations for employment discrimination accrues when decision is "made and communicated" to employee). This is incorrect. There was ample evidence for the jury to conclude that Advanta retaliated against Riseman after he asserted an age-discrimination complaint.

Advanta states that its decision to move Riseman from the position of "President and CEO" to "Chairman" was made and communicated on August 3, 1998, before Riseman engaged in protected activity. However, consistent with its finding on age discrimination, the jury could have concluded that Riseman's shift of positions within Advanta Mortgage was not the relevant retaliation. Instead, the jury could have found retaliation in Advanta's decision to terminate Riseman altogether, as well as to deny him bonuses and severance. These were not inevitable consequences of Riseman's move to the Chairman position, but independent sources of retaliation. *See Ricks*, 449 U.S. at 257-58 & n.9 (distinguishing between inevitable consequences of earlier action and independent forms of discrimination).

Riseman complained about age discrimination on August 17, 1998 and remained employed with Advanta as of August 18, 1998. (P-55; 11/15/00 at 6-12). At the very least, Advanta "communicated" to Riseman that he was employed as of August 18, 1998. (P-56; P57). On December 5, 2000, Advanta's counsel confirmed to the Court that Riseman remained employed as of August 18, 1998. (12/5/00 at 74-76, 80).

Thus, the jury had sufficient evidence to conclude that Advanta terminated Riseman, and/or denied him bonuses and severance, after he had engaged in protected activity on August 17, 1998. Viewing the inferences in the light most favorable to the verdict winner, the jury was well within its right to find retaliation under the ADEA. *See Woodson v. Scott Paper Co.*, 109 F.3d 913, 920-21 (3d Cir. 1997) (evidence at trial supported causal link between complaints of discrimination and termination); *Delli Santi v. CNA Ins. Co.*, 88 F.3d 192 (3d Cir. 1996) (evidence at trial allowed jury to find retaliation).

(2) Breach of Contract: 1998 Bonus

Advanta also contends that the jury should not have been allowed to consider the 1998 bonus under a breach of contract theory because: (1) Advanta's retention of discretion to determine whether Riseman fulfilled the bonus conditions precluded formation of a contract; (2) Advanta's retention of discretion to decide whether or not Riseman fulfilled the bonus conditions was "absolute," and (3) Riseman did not fulfill the contractual condition requiring him to be employed with Advanta on March 31, 1999. These arguments fail.

Advanta claims that the 1998 bonus could not give rise to a contract since, by retaining discretion to evaluate fulfillment of the bonus criteria, Advanta committed itself to nothing. However, Advanta did not strike an "illusory bargain" because Riseman enjoyed a reasonable expectation that Advanta would exercise its discretion in "good faith." *See U.S. v. Isaac*, 141 F.3d 477, 482-84 (3d Cir. 1998) (contract could be formed even where one party reserves "sole discretion" to perform its part); *Gautney v. Amerigas Propane, Inc.*, 107 F. Supp.2d 634, 640, 646-47 (E.D. Pa. 2000) (contract could be formed even where corporate officer has "final discretion" to determine plaintiff's eligibility for bonus under Management Incentive Plan); *Kofsky v. Chemical Residential Mortg. Corp.*, 1999 WL 1016976 * 3 (E.D. Pa. 1999) (contract for commissions could arise, even where defendant retains discretion over commission program). Thus, a contract could have been formed with respect to the 1998 bonus.[4]

Second, Advanta's discretion to award the 1998 bonus to Riseman was not "absolute." *See Goldstein v. Johnson & Johnson*, 251 F.3d 433, 444-46 & n.7 (3d Cir. 2001) (even where party has "sole authority" or "final and conclusive" authority to interpret agreement, discretion must be exercised in good faith); *Sterling Nat. Mortg. Co., Inc. v. Mortgage Corner, Inc.*, 97 F.3d 39, 44 (3d Cir. 1996) (even where party has "total discretion" or "unbounded discretion" under contract, discretion must be exercised in good faith"). Under the covenant of good faith and fair dealing, "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." RESTATEMENT (SECOND) OF CONTRACTS § 205 & Cmt. a. This implied duty may be breached where there is "interference with or failure to cooperate in the other party's performance." *Somers v. Somers,* 418 Pa. Super. 131, 136-39, 613 A.2d 1211, 1213-15 (1992).

Consistent with its finding that there was no "good faith" basis to withhold Riseman's wages under the WPCL, and that Advanta's violation of the ADEA was "willful," the jury was entitled to conclude that Advanta denied Riseman the 1998 bonus in violation of the covenant of good faith and fair dealing. Accordingly, Advanta is not entitled to judgment as a matter of law on this ground.

Finally, Advanta asserts that under the terms of the May 12, 1998 memorandum, Riseman was required to be employed with Advanta on March 31, 1999. Riseman did not fulfill this condition, argues Advanta, because he was terminated before March 31, 1999. In spite of Advanta's paraphrase, the March 31, 1999 condition requires "being here at the time." (P-48). "it is hornbook law that if the relevant terms in a contract are ambiguous, the issue must go to a jury." *Emerson Radio Corp. v. Orion Sales, Inc.*, 253 F.3d 159, 163 (3d Cir. 2001). With respect to the ambiguous phrase, "being here at the time," Riseman testified that he had to agree to stay with Advanta through March 31, 1999. (11/14/00 at 145-51; 11/15/00 at 133-34).[5] The jury could conclude that Riseman's agreement to stay with Advanta during a crucial transition period satisfied this contractual condition. *See Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265, 1271-73 (3d Cir. 1979) (*en banc*).[6]

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[4] The jury was not instructed to assume that a contract existed. Rather, the jury was provided criteria with which to evaluate whether or not one or more contracts had been formed. (12/5/00 at 60-65).

Alternatively, the jury could determine that the condition was excused. For example, the jury could decide that Advanta fired Riseman in violation of the ADEA, thereby preventing him from "being here at the time." *See* RESTATEMENT (SECOND) OF CONTRACTS § 225, Cmt. b; *McDermott v. Party City Corp.*, 11 F. Supp.2d 612, 621

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[5] "Being here at the time" is ambiguous because it is "capable of more than one reasonable interpretation." *Pacitti v. Macy's*, 193 F.3d 766, 773-75 (3d Cir. 1999) (despite language reserving "sole discretion" to offeror, contract could have conveyed a definite promise). Considering the words of the contract, the alternative meaning suggested by counsel, and the objective evidence, Riseman offered a "reasonable alternative interpretation" of the phrase. *Bohler-Uddeholm America, Inc. v. Ellwood Group,. Inc.*, 247 F.3d 79, 93-96, 100 (3d Cir. 2001) (latent ambiguity requires "contractual hook"). For example, "being here at the time" could incorporate an implicit promise that Advanta would not prevent Riseman from "being here" in violation of federal law (ADEA).

[6] Advanta's memorandum of May 12, 1998 purported to reduce to writing an oral agreement reached two months earlier. If Advanta wanted to reserve the right not to pay the 1998 bonus through the simple expedient of terminating Riseman, it should have been more specific in the memorandum. Written contracts must be construed against the drafter, especially where the drafter is a sophisticated commercial entity. *See Pacitti*, 193 F.3d at 775 n.5 (citing Pennsylvania law).

(E.D. Pa. 1998) ("If a party acts to hinder the satisfaction off a condition, the condition is excused."); *Cf. Apalucci v. Agora Syndicate. Inc.*, 145 F.3d 630, 634 (3d Cir. 1998) ("[W]hen one party to a contract unilaterally prevents the performance of a condition upon which his own liability depends, the culpable party may not then capitalize on that failure."); *Anthuis v. Colt Indus. Operating Corp.*, 971 F.2d 999, 1008 n.8 (3d Cir. 1992) (quoting 5 WILLISTON ON CONTRACTS § 677, at 224 (3d ed. 1961)) ("It is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance ... of a condition upon which his own liability depends, he cannot take advantage of the failure.").

Accordingly, judgment as a matter of law is not appropriate with respect to the 1998 bonus.

(3) Breach of Contract: 1997 Bonus

Advanta contends that Riseman could not recover the 1997 bonus because Advanta Mortgage did not experience a "change of control," and the mere fact that Advanta awarded the bonus to employees whose business units did not experience a change of control does not entitle Riseman to a bonus as well. Judgment as a matter of law is not warranted.

The April 28, 1997 letter provided for a bonus of 200% of Riseman's salary if there were a "change of control affecting your group." (P-46). It is undisputed that the sale of Advanta's consumer credit card division to Fleet constituted a "change of control." In addition, there was ample evidence for the jury to conclude that this change of control affected Riseman's group, Advanta Mortgage.

In 1998, after Advanta sold its consumer credit card division to Fleet, Advanta Mortgage became the most important and profitable business unit at Advanta, representing 85% of the revenues, assets and profits of the entire corporation. (P-8; P-251; 11 /20/00 at 87-88; 11/21/00 at 47-65). As the mortgage group assumed greater prominence within the company, Riseman's business and personal performance came under closer scrutiny from the Office of the Chair. (11/14/00 at 126, 145-47; 11/27/00 at 103; 11/29/00 at 129). The jury could conclude that such enhanced expectations from Advanta Mortgage and Riseman, precipitated by the sale of Advanta's consumer credit card division, was a change of control "affecting" Riseman's group; (11/14/00 at 132; 11/17/00 at 120, 138-66).[7] Judgment as a matter of law will not be granted.

(4) Detrimental Reliance

Finally, Advanta argues that a detrimental reliance claim should not have been submitted to the jury because Riseman did not refrain from seeking other employment. This contention fails because there was evidence to support detrimental reliance on other grounds. For instance, the jury could have found that Riseman worked harder, increased his flexibility and cooperation with management, or otherwise was induced into action or forbearance of a definite and substantial character in reliance on a bonus promise. *See JMJ Enterprises, Inc. v. Via Veneto Italian Ice, Inc.*, 1998 WL 175888 * 3 (E.D. Pa. 1998), *aff'd*, 178 F.3d 1279 (3d Cir. 1999) (table); *Robert Mallery Lumber Corp. v. B & F Assocs., Inc.*, 294 Pa. Super. 503, 511-12, 440 A.2d 579, 582-83 (1982).[8] Accordingly, judgment as a matter of law is inappropriate.

Advanta has not demonstrated that the record is "critically deficient of that minimum quantum of evidence from which a jury might reasonably afford relief." *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1095 (3d Cir. 1995); *Williamson v. Consolidated Rail Corp.*, 926 F.2d 1344, 1348 (3d Cir. 1991). Therefore, I will deny the renewed motion for judgment as a matter of law.

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[7] The fact that Advanta reserved "sole discretion" to determine whether the change of control affected Riseman's group is not dispositive. As with the 1998 bonus, the jury could have found that Advanta failed to exercise its discretion in good faith. *See, e.g., Germantown Mfg. Co. v. Rawlinson*, 341 Pa. Super. 42, 60-61, 491 A.2d 138, 148 (1985).

[8] Advanta's fallback position that Riseman could not have "reasonably relied" on a discretionary promise also misses the mark. Riseman could have reasonably relied on Advanta's implicit promise to exercise its discretion in good faith.

B. ADVANTA'S MOTION FOR NEW TRIAL

Pursuant to Federal Rule of Civil Procedure 59, Advanta moves for a new trial on Riseman's claims of retaliation under the ADEA, breach of contract, detrimental reliance, and violation of the WPCL. Advanta argues that the damages verdict is against the weight of the evidence, and thus a new trial on damages and liability is warranted. This motion will be denied.

A motion for new trial based upon the weight of the evidence is entitled to great scrutiny because it invites the court to substitute its judgment for that of the jury. *See Wilburn v. Maritrans Gp. Inc.*, 139 F.3d 350, 363-64 (3d Cir. 1998); *Delli Santi v. CNA Ins. Co.*, 88 F.3d 192, 201 (3d Cir. 1996). Such a motion may be granted only if the court, in its discretion, finds that the jury's verdict represents a "miscarriage of justice," or cries out to be overturned because it "shocks the conscience." *Williamson v. Consolidated Rail Corp.*, 926 F.2d 1344, 1352-53 (3d Cir. 1991); *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 211 (3d Cir. 1992).

A motion for new trial is imbued with constitutional dimensions. *See Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962) (Seventh Amendment requires jury to resolve disputed fact questions). If the verdict winner sets forth even a "minimally plausible" or "conceivable" way of reconciling the jury's answers, the court is "*constitutionally bound*" to deny the motion. *McAdam v. Dean Witter Reynolds, Inc.*, 896 F.2d 750, 764-66 (3d Cir. 1990) (emphasis in original). Because new trials "effect[] a denigration of the jury system" and "usurp[] the prime function of the jury as the trier of the facts," *Lind v.*

Schenley Indus., Inc., 278 F.2d 79, 88-91 (3d Cir. 1960) (*en banc*), the constitutional guarantees of the Seventh Amendment have "particular force" when a losing party attacks the weight of the evidence. *See Williamson*, 926 F.2d at 1348.

Advanta's motion for a new trial does not satisfy these procedural and constitutional standards.

(1) Damages

First, Advanta attacks the jury's damage award as "impossible." A damages verdict will be affirmed if "'there is *any view* of the case which reconciles the [jury's] various answers.'" *McAdam v. Dean Witter Reynolds, Inc.*, 896 F.2d 750, 763 (3d Cir. 1990) (emphasis in original) (quoting *Bradford-White Corp. v. Ernst & Whinney*, 872 F.2d 1153, 1159 (3d Cir. 1989)). In reviewing the jury's verdict, I may not speculate as to what the jurors were "really" trying to do, or weigh the reasonableness of Riseman's view of the evidence against Advanta's view. *See id.* at 763-65. If Riseman's view is conceivable, the jury's verdict may not be disturbed.[9]

The jury awarded $3,939,126 in total damages, including $1,377,125 in back pay and $2,562,001 under the WPCL. The jury's award is consistent with the evidence and certainly does not "shock the conscience." First, the total award of $3,939,126 is reasonably close to what the damages expert suggested was appropriate under conservative assumptions. (12/1/00 at 89-95). Advanta presented no contrary damages expert.

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[9] *Cf. Atlantic & Gulf Stevedores. Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962) ("Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way."); *McAdam v. Dean Witter Reynolds, Inc.*, 896 F.2d 750, 764 (3d Cir. 1990) (court is "under a constitutional mandate to search for a view of the case that makes the jury's answers consistent"); *Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*, 626 F.2d 280, 293 (3d Cir. 1980) ("[if] there is at least one way to explain the jury's answers to the interrogatories, [court is] bound to affirm them").

Second, the $1,377,125 "back pay" award could have been computed under several scenarios. One possible method, suggested by Riseman, is the difference between the salary and AMIP bonus amounts Riseman could have earned at Advanta between October 1998 and December 2000, and the amounts he actually earned during this time. In 1998, Riseman received a 20% merit raise, from $325,000 to $385,000 in salary. (P-61G; 11/14/00 at 140). Considering the trend in Riseman's salary since 1992, as well as the mortgage unit's pivotal status after 1998, the jury could have projected similar increases for 1999 and 2000. With such raises, Riseman could earn a 1999 AMIP bonus of $462,000, a 2000 AMIP bonus of $554,400, and $360,725 more in Advanta base salary than he actually earned between October 1998 and December 2000. Alternatively, the jury could have awarded lower AMIP bonuses in 1999 and 2000, and found a higher salary differential between October 1998 and December 2000. In either case, $1,377,125 in "back pay" is justifiable.[10]

Finally, the WPCL award of $2,562,001 could include $650,000 from the 1997 bonus, $400,000 from the 1998 bonus, plus an unliquidated amount from the 1998 AMIP bonus.[11] Advanta's post-trial position is that Riseman's AMIP bonus for 1998 was capped at double his "target" bonus. However, Advanta points to no evidence establishing a conclusive cap on Riseman's AMIP bonus for that year. Also, while insisting that the jury should receive instructions on the parameters of the 1997 and 1998 bonuses, Advanta did not seek an instruction regarding any damages ceiling on the AMIP bonus. In fact, on December 5, 2000, when the jury asked where it could find Riseman's 1998 AMIP bonus in the evidence, Advanta agreed there was no document defining Riseman's 1998 AMIP bonus, and the jury was so instructed. (12/5/00 at 78-80). Thus, the jury conscientiously considered how much to award for Riseman's 1998 AMIP bonus, and reasonably could have believed there was no *per se* limit on the amount.[12]

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[10] This "back pay" hypothetical does not even include the 1997 bonus, the 1998 bonus, or the 1998 AMIP bonus. For instance, a bonus may have been denied before Riseman engaged in protected activity or, perhaps, denied in bad faith but not in retaliation for an age-discrimination complaint.

[11] Because the verdict is most reasonably read without any overlapping "back pay" or WPCL components, an award of liquidated damages under ADEA and WPCL would not constitute "double recovery."

The jury could award a 1998 AMIP bonus of $1,512,001, based upon Riseman's role at Advanta Mortgage and the company's overall performance. There was extensive evidence of how Riseman personally saved, turned around, and built the mortgage unit. (P-51-54; P-116; 11/14/00 at 105-125; 11/17/00 at 64-65; 11/20/00 at 61-63; 11/21/00 at 47-65). The jury learned that, under Riseman's leadership, Advanta Mortgage became the most important and profitable business unit at Advanta. By 1998, Advanta Mortgage alone constituted 85% of the revenues, assets and profits of the entire Advanta Corporation. (P-8; P-251; 11/20/00 at 87-88; 11/21/00 at 47-65). Based upon Advanta's financial performance in 1998, including the undeniable contribution of Riseman and Advanta Mortgage, the jury could have decided that a $1.5 million bonus was appropriate. Under the circumstances of this case, the jury's bonus award certainly does not "shock the conscience." *See Paolella v. Browning-Ferris, Inc.*, 158 F.3d 183, 189, 19495 (3d Cir. 1998) (upholding front pay award that was "more than 17 times" the amount defendant claimed was supported by the evidence).[13]

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[12] Advanta did not even mention the AMIP bonus in its closing argument to the jury. (12/4/00 at 192-225).

The law does not command mathematical precision in ascertaining damages from the evidence. *See Scully v. US Wats. Inc.*, 238 F.3d 497, 515 (3d Cir. 2001). When a jury restores a victim to the economic position he would otherwise have occupied, any imprecision in damages must be borne by the wrongdoer. *See Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 889 (3d Cir. 1984) ("The risk of lack of certainty with respect to projections of lost income must be borne by the wrongdoer, not the victim."); *Young v. Lukens Steel Co.*, 881 F. Supp. 962, 976 (E.D. Pa. 1994) ("'any ambiguity in what the claimant would have received but for the (retaliation] should be resolved against the [retaliating] employer'") (citations omitted).

Moreover, "it is well accepted that a court will not inquire into the calculation methods employed by the jury during its deliberations." *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265, 1279 n.19 (3d Cir. 1979) (*en banc*). Instead, a court "must assume" that the jury acted rationally, "'followed the court's instructions and arrived at a verdict based on those instructions.'" *Loughman v. Consol-Pennsvlvania Coal Co.*, 6 F.3d 88, 102, 105 (3d Cir. 1993) (citations omitted).

Because the verdict does not represent an "impossible" application of the evidence to the instructions, a new trial will not be granted on this basis.

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[13] With respect to Advanta's key corporate executives, the jury was told of numerous instances in which Riseman's colleagues received sizable bonuses. For example, in 1998, executives Dennis Alter and William Rosoff each received $5 million bonuses, in addition to other bonuses plus base compensation. (11/17/00 at 141-42; 12/1/00 at 61-65; P-281 at 8-9). Apart from other compensation, Elizabeth Mai received a $1.5 million bonus. (11/17/00 at 139; 11/28/00 at 9; 11/29/00 at 226-27).

(2) Severance

Advanta also seeks a new trial because it believes that the jury may have awarded severance damages. This speculation does not warrant a new trial.

At summary judgment, the Court reserved the issue of severance damages for an ERISA bench trial, but did not state that severance was irrelevant to ADEA liability. Riseman subsequently introduced evidence of disparate severance pay as part of his ADEA case, without asking for severance in his damage calculations or closing argument. (12/4/00 at 191-92). Thus, the jury charge referred to severance as part of Riseman's liability claims, but not as an element of damages. (12/5/00 at 9-11, 54-60). For apparent strategic reasons, Advanta even declined the Court's invitation to instruct the jury not to award severance. (12/5/00 at 13-14). Accordingly, Advanta may not seek a new trial on this ground.

Advanta also argues that none of its former employees who received severance were "similarly situated" to Riseman. At trial, Riseman presented evidence that an executive discharged for theft, dishonesty and breach of trust (after only five months of work) had received substantial severance pay, whereas Riseman (who had been with Advanta for over five years) received no severance pay. (11/17/00 at 169-177). Whether such former Advanta employees were "similarly situated" to Riseman was a jury question. The admission of this evidence does not compel a new trial.

(3) ADEA "Back Pay"

Advanta next contends that the 1997 bonus and 1998 bonus cannot be included in "back pay." I need not address this argument because the jury did not necessarily include either bonus in its "back pay" award. *See, e.g.*, Part II(B)(1), *supra*.

(4) ADEA "Front Pay"

Advanta moves for a new trial with regard to ADEA "front pay," claiming: (1) Riseman waived his right to seek front pay through a comment at the pre-trial conference, (2) front pay is an equitable remedy that cannot be awarded by a jury, and (3) Riseman was not eligible for front pay because he had reestablished himself in the workforce. These arguments do not entitle Advanta to a new trial.[14]

(1) Waiver

First, Advanta contends that Riseman waived his right to seek front pay when one of his attorneys stated at the final pretrial conference that Riseman was not seeking reinstatement. In *Wehr v. Burroughs Corp.*, 619 F.2d 276, 283-84 & n.18 (3d Cir. 1980), the plaintiff waived front pay where his attorney specifically disclaimed reinstatement in a letter to the court.[15] However, in *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 795-97 (3d Cir. 1985), the Third Circuit distinguished *Wehr*, holding that the issue of front pay was preserved when plaintiff requested future damages in his complaint. Understandably, in this case, Riseman requested front pay rather than reinstatement.[16] Absent an unequivocal disclaimer such as the letter sent to the court in *Wehr*, Riseman did not waive his right to seek front pay.

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[14] Because there is a possibility that the jury awarded "front pay," I will address Advanta's arguments.

[15] In *Wehr*, the Third Circuit did not hold that it would have been error for the district court to consider front pay, but only that the district court did not abuse its discretion in finding waiver. *See id.* at 284 n. 19.

[16] Reinstatement may not be feasible if there is "continuing hostility" and "animosity" between the parties or, alternatively, no position is available at the time of judgment. *See Pollard v. E.I. du Pont de Nemours & Co.*, 121 S.Ct. 1946, 1948 (2001); *Starceski*, 54 F.3d at 1103; *Maxfield*, 766 F.2d at 796. It was abundantly evident during this litigation (and in repeated settlement attempts) that there was irreparable animosity between the parties. Moreover, Advanta argued at trial that there would likely not be a position for Riseman because Advanta was contemplating the sale of its mortgage company. Reinstatement was not feasible in this case, and no party has ever argued otherwise.

(ii) Awarded by the Jury

Advanta goes on to assert that front pay is an equitable remedy which cannot be awarded by the jury. This argument is foreclosed by controlling Third Circuit precedent.

It is for the court to decide whether reinstatement is feasible and, if not, whether front pay should be awarded in lieu of reinstatement. *See Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1103 (3d Cir. 1995); *Blum v. Witco Chemical Corp.*, 829 F.2d 367, 374 (3d Cir. 1937). However, once the court decides that reinstatement is not feasible, the amount of damages to be awarded as front pay becomes a jury question. *See Blum*, 829 F.2d at 374 n.4; *Maxfield*, 766 F.2d at 796.

(iii) Eligibility for Front Pay

Finally, Advanta claims that Riseman was not eligible for front pay as a matter of law. A monetary substitute for the equitable remedy of reinstatement, front pay is designed to restore the victim of an employer's unlawful conduct to the position he would have otherwise occupied. *See Pollard v. E.I. du Pont de Nemours & Co.*, 121 S.Ct. 1946, 1950 (2001); Maxfield, 766 F.2d at 795-96. Advanta argues that Riseman was not eligible for this "make-whole" remedy because he reestablished his rightful place in the workforce. *See Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 889-90 (3d Cir. 1984) (in business sales context where plaintiff reestablished herself, district court did not abuse discretion in limiting front pay award to four months). But whether Riseman had reestablished his rightful place in the workforce (and, if so, when) was a jury question. To the extent that the jury awarded front pay, it resolved this issue against Advanta.

Advanta also challenges Riseman's request that he be awarded front pay to age 70 or 75. *See Anastasio v. Schering Corp.*, 838 F.2d 701, 709-10 (3d Cir. 1988) (where jury findings were consistent with decision that plaintiff would have retired before age 70, ADEA did not "guarantee ... an annuity to age 70"). Given that Riseman was 64 years of age at the time of trial, a front pay award up to age 70 or 75 would not be inappropriate as a matter of law. *See Feldman v. Philadelphia Housing Auth.*, 43 F.3d 823, 832-33, 841 (3d Cir. 1995) (upholding 38 year-old's front pay award to retirement age of 65); *Blum*, 829 F.2d at 375-76 (failure to award front pay to 63 year-old until normal retirement age could constitute abuse of discretion).[17]

For these reasons, the submission of Riseman's front pay claim to the jury does not merit a new trial.

(5) Breach of Contract

Advanta seeks a new trial on Riseman's breach of contract claims for substantially the reasons argued in its motion for judgment as a matter of law. To the extent Advanta relies upon its discretion to deny the 1997 and 1998 bonuses, the retention of discretion did not give Advanta license to act in bad faith. In view of the substantial evidence that Advanta had been satisfied with Riseman's performance from 1992 to 1997, the jury could have concluded that Advanta's purported dissatisfaction with Riseman in 1998 was not genuine. There was also sufficient evidence for the jury to decide that all contractual conditions were satisfied or excused.

Advanta's only other basis for seeking a new trial on breach of contract is that the jury charge did not enumerate the specific conditions applicable to each of the contracts. Where an objection to a jury charge has been preserved, the court must ask whether the charge, "'taken as a whole, properly apprises the jury of the issues and the applicable

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[17] Whether or not Riseman testified about a specific intention to retire on a particular date, there was sufficient evidence for the jury to calculate a reasonable front pay award. *See Gorniak v. National R.R. Passenger Corp.*, 889 F.2d 481, 486-87 (3d Cir. 1989).

law.'" *Watson v. Southeastern Pennsylvania Transp. Auth.*, 207 F.3d 207, 212 (3d Cir. 2000), *cert. denied*, 121 S.Ct. 1086 (2001); *Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 275 (3d Cir. 1998); *Limbach Co. v. Sheet Metal Workers Int'l Ass'n, AFL-CIO*, 949 F.2d 1241, 1259 n.15 (3d Cir. 1991) (*en banc*).

The Court's charge met that standard. The jury instructions avoided reciting either parties' characterizations of the facts, but informed the jury of the issues and applicable law. Advanta had every opportunity to explain the contractual conditions, as it viewed them, to the jury. A new trial on breach of contract is not required.

(6) WPCL

With respect to the WPCL, Advanta moves for a new trial on three grounds: (1) Riseman's bonuses were not "earned" within the meaning of the WPCL, (2) the jury was not given a specific instruction on the definition of "good faith," and (3) the jury was not instructed that Riseman had the burden to prove lack of good faith by "clear and convincing" evidence. None of these assertions compel a new trial.

(i) Riseman's Bonuses Were "Earned"

Advanta argues that Riseman's 1998 bonus and 1998 AMIP bonus were not "earned" within the meaning of the WPCL. Under the WPCL, "[w]henever an employer separates an employe from the payroll, or whenever an employe quits or resigns his employment, the wages or compensation earned shall become due and payable not later than the next regular payday of his employer on which such wages would otherwise be due and payable." 43 P.S. § 260.5(a). The WPCL does not create a substantive right to compensation, but rather a statutory remedy for an employer's breach of contractual obligation to pay wages. *See Weldon v. Kraft, Inc.*, 896 F.2d 793, 801 (3d Cir. 1990); *Kafando v. Eric Ceramic Arts Co.*, 764 A.2d 59, 61 (Pa. Super. 2000).

The term "wages" includes "fringe benefits or wage supplements" which, in turn, includes any amount to be paid pursuant to an agreement between the employer and the employee. *See* 43 P.S. § 260.2a. To the extent Riseman's bonuses were to be paid pursuant to an agreement with Advanta, they were statutory "wages" (as well as "fringe benefits or wage supplements") under the WPCL. Although several courts have determined that "wages" must be "earned" to be recoverable under section 260.5(a), at least one district court in this Circuit has held that "fringe benefits or wage supplements" need not be "earned." *See Bowers v. NETI Technologies, Inc.*, 690 F. Supp. 349, 353 n.5 (E.D. Pa. 1988) ("earned" requirement significantly absent from 43 P.S. § 260.3(b)).[18] Under this WPCL interpretation, Riseman need not have "earned" any bonuses that fit the definition of "fringe benefits or wage supplements."

However, assuming that Riseman's bonuses had to be "earned," the jury could have decided that Riseman earned his bonuses. "The contract between the parties governs in determining whether specific wages are earned." *Weldon*, 896 F.2d at 801; *Gautney v. Amerigas Propane, Inc.*, 107 F. Supp.2d 634, 646 (E.D. Pa. 2000). The jury could conclude that when Advanta unlawfully terminated Riseman under the ADEA and breached its bonus agreements, Riseman had a vested contractual entitlement to bonuses for work already performed—not merely a contractual expectation to earn wages in the future. *See Regier v. Rhone-Poulenc Rorer, Inc.* 1995 WL 395948 * 8 (E.D. Pa. 1995), *aff'd*, 92 F.3d 1172 (3d Cir. 1996) (table) (assuming that "fringe benefits or wage supplements" must be earned, they are "earned" when plaintiff renders sufficient services for contractual rights to vest); *see also Kofsky v. Chemical Residential Mortg. Corp.*, 1999 WL 1016976 * 4-5 (E.D. Pa. 1999) (viability of contract claim for commissions precluded summary judgment on WPCL claim).[19]

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[18] In two of its most recent cases interpreting the WPCL, the Pennsylvania Superior Court recognized Bowers specifically. *See Kafando v. Erie Ceramic Arts Co.*, 764 A.2d 59, 63 (Pa. Super. 2000); *Hartman v. Baker*, 766 A.2d 347, 353 (Pa. Super. 2000), *appeal denied* 764 A.2d 1070 (2000).

This conclusion is reinforced by several factors. First, the civil provisions of the WPCL must be liberally construed to effectuate their remedial purpose and "promote justice." *See* 1 Pa. C.S.A. § 1928(c); *Regier*, 1995 WL 395948 * 6; *Bowers* 690 F. Supp. at 354. The underlying purpose of the WPCL is to remove some of the obstacles employees face in litigation, by providing them with a statutory remedy to recover contractual wages from an employer. *See Barnhart v. Compugraphic Corp.*, 936 F.2d 131, 133-34 (3d Cir. 1991); *Oberneder v. Link Computer Corp.*, 548 Pa. 201, 206, 696 A.2d 148, 151 (1997); *Hartman v. Baker*, 766 A.2d 347. 352-53 (Pa. Super. 2000), *appeal denied*, 764 A.2d 1070 (2000). At the same time, the mere fact that Riseman was no longer employed by Advanta after October 1998 is not controlling. *See Scully v. US Wats, Inc.*, 238 F.3d 497, 517-18 (3d Cir. 2001) (where defendant discharged plaintiff and prevented him from exercising stock options while on the payroll, ex-employee had "earned" stock options within the meaning of the WPCL).

Under the constellation of facts and findings in this case, the jury could have concluded that Riseman "earned" the 1997 bonus, the 1998 bonus and the 1998 AMIP bonus within the meaning of the WPCL.

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[19] In this case, Riseman did not seek to recover salary and commissions that would have been earned after his separation from Advanta, but rather to recover bonuses for work that was already substantially performed when Advanta breached its part of the bargain. *Compare Sendi v. NCR Comten, Inc.*, 619 F. Supp. 1577 (E.D. Pa. 1985), *aff'd*, 800 F.2d 1138 (3d Cir. 1986) (table) (since WPCL does not govern wages agreed to be paid in the future for services to be rendered in the future, plaintiff could not recover commissions on sales that would have been consummated after his termination date).

(ii) Definition of "Good Faith"

Advanta alternatively challenges the Court's award of liquidated damages pursuant to the jury's finding that Advanta did not withhold wages in "good faith." Where wages remain unpaid for thirty days beyond the regularly scheduled payday, an employee can recover liquidated damages equal to 25% of the wages due, unless there is a "good faith contest or dispute" about the wage claim. *See* 43 P.S. § 260.10. The jury found that Advanta had no "good faith" basis to withhold Riseman's wages under the WPCL. Advanta now argues that the jury was without proper guidance on the meaning of "good faith."

In the first place, Advanta did not submit a proposed jury instruction concerning the "good faith" issue. Advanta did not address the "good faith" issue at all until shortly before the jury was to receive its instructions, after the charging conferences and review of the charge itself had been completed. (12/4/00 at 136-45; 12/5/00 at 37). Moreover, Advanta's argument lacks merit. The WPCL does not provide a statutory definition of "good faith." *See* 43 P.S. § 260.2a.[20] Because juries are sufficiently equipped to understand and apply this term, the verdict does not represent a "miscarriage of justice."

(iii) "Clear and Convincing" Evidence

Finally, Advanta claims that the Court should have instructed the jury that Riseman was required to prove lack of good faith by "clear and convincing" evidence. For this proposition, Advanta cites *Hartman v. Baker*, 766 A.2d 347 (Pa. Super. 2000), *appeal denied*, 764 A.2d 1070 (2000). However, *Hartman* did not place the burden of proof on the employee to prove bad faith. Instead. *Hartman*, assumed that the employer bore the burden to prove good faith by clear and convincing evidence. *See id.* at 353-54. Advanta could not have been prejudiced by the absence of an instruction requiring *it* to prove good faith by clear and convincing evidence.

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[20] As neither the WPCL nor decisional law have defined "good faith," the Pennsylvania Superior Court recently consulted Black's Law Dictionary. *See Hartman v. Baker*, 766 A.2d 347, 354 n.3 (Pa. Super. 2000), *appeal denied*, 764 A.2d 1070 (2000) Black's definition of "good faith" does not deviate from an ordinary understanding of the term. *See, e.g.*, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 527 (9th ed. 1984). In addition, Black's definition references the covenant of good faith and fair dealing, about which the jury was instructed. *See* BLACK'S LAW DICTIONARY 701 (7th ed. 1999).

Accordingly, none of Advanta's claims concerning the WPCL earn it a new trial.

(7) Admissions

Advanta argues next that the Court should have prevented Riseman from impeaching its witnesses with "admissions" contained in Advanta's pleadings and in a reply brief. Advanta says its lawyers' statements that Riseman had been "terminated" and "fired" were not judicial admissions. A new trial is not mandated on this basis because no legal error occurred, and it is "highly probable" that the ruling did not "affect the outcome of the case." *McOueeney v. Wilmington Trust Co.*, 779 F.2d 916, 917 (3d Cir. 1985).

"'A party's assertion of fact in a pleading is a judicial admission by which it normally is bound throughout the course of the proceeding.'" *Schott Motorcycle Supply, Inc. v. American Honda Motor Co.*, Inc., 976 F.2d 58, 61 (1st Cir. 1992) (citing Second, Fifth, Sixth, and Eighth Circuits). While emphasizing that Advanta did not sign its attorneys' Answer to the Complaint and Amended Complaint, Advanta concedes that its Answer is a pleading. The pleading that Riseman was "terminated" can reasonably be construed as an assertion of fact. *See id.* at 61 (statement that "contract" existed between the parties construed as "factual" assertion).[21]

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[21] In the context of this case, a statement that Riseman was "terminated," or even "fired," is not a legal conclusion. The jury received

Furthermore, it does not appear that Advanta was pleading a defense "alternately or hypothetically" under Federal Rule of Civil Procedure 8(e)(2). *See* Charles Alan Wright & Arthur R. Miller, 5 FEDERAL PRACTICE AND PROCEDURE § 1282 at 525 (West, 2d ed. 1990) (alternative pleading drafted in terms of "either-or," and hypothetical pleading formulated as "if-then"). Thus, the admission of Advanta's statements is not in tension with Rule 8(e)(2). *See Giannone v. U.S. Steel Corp.*, 238 F.2d 544, 547-48 (3d Cir. 1956) (noting possible tension between admission of pleadings and Rule 8(e)(2), but declining to resolve the issue).[22]

Accordingly, the factual statements contained in Advanta's pleadings and reply brief were admissible for impeachment purposes. *See Giannone*, 238 F.2d at 547 (even withdrawn or superseded pleadings are admissible); *Johnson v. Goldstein*, 864 F. Supp. 490, 492-93 (E.D. Pa. 1994), aff d, 66 F.3d 311 (3d Cir. 1995) (table); *Gerlach v, Volvo Cars of*

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instructions about Advanta's right to fire Riseman, and no wrongful discharge claim was presented at trial. (12/5/00 at 56). The ultimate legal issue was whether Riseman experienced "discrimination" or "retaliation." *Compare Giannone v. U.S. Steel Corp.*, 238 F.2d 544, 548 (3d Cir. 1956) (affirming exclusion of select language from third-party complaint that charged third-party defendant with "negligence," where third-party plaintiff/defendant did not itself admit any "negligence").

[22] The parallel statement in Advanta's reply brief was cumulative and otherwise independently admissible. *See, e.g.*, Fed. R. Evid. 801(d)(2); *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226-27 (9th Cir. 1988); *U.S. v. Kattar*, 840 F.2d 118, 130-31 (1st Cir. 1988). It would be anomalous to admit statements of corporate employees as substantive evidence, but not to admit statements by the company's attorney, during the instant litigation, for impeachment. *See Zipf v. American Tel. & Tel. Co.*, 799 F.2d 889, 894-95 & n.8 (3d Cir. 1986), *U.S. v. Johnson*, 752 F.2d 206, 210-11 (6th Cir. 1985). Moreover, through further examination and argument, Advanta had every opportunity to place the alleged "admissions" in context. *Cf. Derby & Co., Inc. v. Seaview Petroleum Co.*, 756 F. Supp. 868, 877 (E.D. Pa. 1991) (inconsistent statement made in other litigation should be weighed along with all other evidence).

North America, 1997 WL 129004 * 4 n.2 (E.D. Pa. 1997) (citing Second and Third Circuits); *U.S. v. Owens Contracting Services, Inc.*, 884 F. Supp. 1095, 1108 (E.D. Mich. 1994) (citing Sixth and Ninth Circuits).

In any event, it is highly probable that the outcome of the case did not depend upon this evidence. While the jurors asked for an exhibit number because they were "unable to find letter from Mr. Goldich stating Mr. Riseman was 'fired,'" the Court informed the jury that no such letter existed. (Docket Entry # 161, Question 2). With this response, the jury returned to its deliberations and did not inquire about the matter further. (12/5/00 at 74-80). Moreover, Advanta was not judicially estopped from arguing that Riseman had "resigned," and any statement that Riseman had been "terminated" or "fired" was not deemed conclusive. *Compare Travelers Indem. Co. v. Engel*, 1994 WL 398788 * 3-4 (E.D. Pa. 1994) (admission in defendant's Answer deemed conclusive, even though post-pleading affidavit contradicted admission).

Because the challenged evidentiary rulings were correct, and it is highly probable that they did not affect the outcome in any event, a new trial is not warranted.

(8) Deposition Transcripts

Finally, Advanta complains that it was not allowed to read excerpts from certain deposition transcripts showing that Riseman had explored potential employment with Providian Financial Corporation. Advanta claims that if the jury had heard these excerpts, it might have found against Riseman on detrimental reliance. However, besides foregoing employment, Riseman could have worked harder at Advanta, increased his flexibility and cooperation with management, or otherwise incurred substantial detriment in reliance on a bonus promise. Given the slight probative value of the deposition excerpts and the late hour at which Advanta proposed to read them to the jury, it was a permissible exercise of discretion to exclude this evidence.

None of Advanta's grounds for a new trial meet the procedural and constitutional standards governing this motion. Because I do not find that the jury's verdict represents a "miscarriage of justice," or "shocks the conscience," the motion for a new trial will be denied. *Delli Santi v. CNA Ins. Co.*, 88 F.3d 192, 201-02 (3d Cir. 1996); *Olefins Trading. Inc. v. Han Yang Chem Corp.*, 9 F.3d 282, 289-90 (3d Cir. 1993); *Williamson v. Consolidated Rail Corp.*, 926 F.2d 1344, 1352-54 (3d Cir. 1991); *McAdam v. Dean Witter Reynolds, Inc.*, 896 F.2d 750, 763-66 (3d Cir. 1990); *Lind v. Schenley Indus., Inc.*, 278 F.2d 79, 88-91 (3d Cir. 1960).[23]

C. RISEMAN'S MOTION FOR NEW TRIAL

Riseman moves for a new trial on his age-discrimination claim against Advanta, his detrimental reliance claim against the individual defendants, and his fraud and negligent misrepresentation claims against all defendants. This motion will be denied.

The sole basis for Riseman's motion with respect to age discrimination is that he was unable to obtain certain information during discovery. However, Riseman can point to no error in the Court's discovery rulings that would warrant a new trial on age discrimination. *See Hewlett v. Davis*, 844 F.2d 109, 113-14 (3d Cir. 1988); *In re Fine Paper Antitrust Litig.*, 685 F.2d 810, 817-18 (3d Cir. 1982).[24]

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[23] Advanta's catch-all argument that the verdict is the product of jury passion and prejudice against a large corporation is without merit. The Court specifically instructed the jury: "All persons, including individuals and corporations, stand equal before the law. Sympathy for any party or prejudice against any party should play no part in your deliberations or in your decision." (12/5/00 at 44). Thus, the jury charge stated, and subsequently reiterated, the need for fair and dispassionate consideration of all evidence. (12/5/00 at 59, 72). Moreover, the jury's finding on age discrimination undercuts Advanta's claim of widespread bias and confusion.

[24] "In the event of a new trial," Riseman suggests that the jury should be instructed according to the burdens applicable in a "mixed

Riseman also moves for a new trial on his detrimental reliance claim against the individual defendants. A detrimental reliance claim was submitted to the jury against the corporate defendants, but not the individual defendants, because Riseman's claim sounded in contract. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90(1) & Cmt. d. (12/4/00 at 3, 8-9). As determined at summary judgment, the individual defendants could not be held liable for Advanta's contractual damages. *See, e.g., American Guarantee and Liability Ins. Co. v. Fojanini*, 90 F. Supp.2d 615, 623 n.14 (E.D. Pa. 2000) (corporate officers liable for corporate contracts if they are signatories in an individual capacity, or can be reached under veil-piercing or participation theories); *Harris v. Madison*, 1998 WL 518181 * 2 (E.D. Pa. 1998); *B & L Asphalt Indus., Inc. v. Fusco*, 753 A.2d 264, 270 (Pa. Super. 2000). Riseman's argument that detrimental reliance is an "equitable remedy" does not suffice to make the individual defendants liable for contractual damages of the corporation.

Finally, Riseman moves for a new trial on his fraud and negligent misrepresentation claims. To recover for fraud or negligent misrepresentation, Riseman was required to demonstrate that he justifiably relied upon a false statement or promise, and that he suffered damages as a proximate result of this reliance. *See Gibbs v. Ernst*, 538 Pa. 193, 207-10, 647 A.2d 882, 889-90 (1994); *Delahanty v. First Penn. Bank. N.A.*, 318 Pa. Super. 90, 108,464 A.2d 1243, 1252 (1983). Riseman argues that he refrained from looking for another job because of Advanta's bonus promises, and thus

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motives" case, as opposed to a "pretext" case. *Compare Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), with *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). However, Riseman has not moved for a new trial on this basis (nor would such a motion succeed, *see, e.g.*, 12/1/00 at 170-75), and I need not decide whether a "mixed motives" instruction would be appropriate in the context of a new trial. *See generally Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 512-16 (3d Cir. 1997).

suitable alternative employment was not available for eight months after he was terminated.

However, Riseman failed to produce any evidence of a job that would have been offered to him, and which he would have accepted, in or around October 1998. Indeed, after resting his case, Riseman could point to no evidence of alternative employment that he could and would have obtained. (12/4/00 at 4-7). Nor was there evidence that Advanta's bonus promises proximately caused an eight month period of unemployment. The jury should not have been invited to guess whether some unidentified position existed that Riseman could have accepted in October 1998, and to surmise that Advanta's bonus offers caused Riseman's subsequent unemployment. *See Yerger v. Landis Mfg. Systems, Inc.*, 1989 WL 66443 * 6 (E.D. Pa. 1989), *aff'd*, 924 F.2d 1050 (3d Cir. 1990) (table) ("jury cannot be allowed to speculate on whether there were available to plaintiff other suitable employment opportunities, whether he would have obtained some unidentified position, and if so, how much he would have been paid").

Wholly apart from the issues of justifiable reliance and proximate causation, Riseman did not introduce evidence of the difference between the amounts he earned at Advanta and what he would have earned at a position commencing in or around October 1998. Since Riseman earned more at Advanta than he has earned elsewhere, the mere fact that Riseman remained with Advanta for an additional period of time cannot constitute financial injury. *See Surovcik v. D & K Optical, Inc.*, 702 F. Supp. 1171, 1177-78 (M.D. Pa. 1988) (delay of employment search lacked sufficient nexus to alleged misrepresentation and did not establish actual pecuniary loss); *Engstrom v. John Nuveen & Co., Inc.*, 668 F. Supp. 953, 963 (E.D. Pa. 1987) (remaining with employer who promised excellent salaries, bonuses and promotions, without evidence that plaintiff refused offers of comparable work, cannot constitute financial detriment).

Given the wealth of evidence presented to the jury, there can be no basis for a new trial on Riseman's age-discrimination claim. Moreover, judgment as a matter of law was properly granted with respect to Riseman's detrimental reliance claim against the individual defendants, and fraud and negligent misrepresentation claims. Riseman was fully heard on the issues, and there was no legally sufficient evidentiary basis for a reasonable jury to have found in his favor. *See* Fed. R. Civ. P. 50(a)(1); *Northview Motors, Inc. v. Chrysler Motors Corp.*, 227 F.3d 78, 88 (3d Cir. 2000); *Marinelli v. City of Erie*, 216 F.3d 354, 359 (3d Cir. 2000). Accordingly, Riseman's motion for a new trial will be denied.

An appropriate Order follows.

ORDER

AND NOW, this 7th day of September 2001, it is **ORDERED** that:

(1) Defendants' Motion for Judgment as a Matter of Law (Docket Entry # 171) is **DENIED.**

(2) Defendants' Motion for New Trial (Docket Entry # 172) is **DENIED.**

(3) Plaintiffs Motion for New Trial (Docket Entry # 174) is **DENIED.**

/s/ Anita B. Brody
ANITA B. BRODY, J.

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MILTON RISEMAN :

v. : 98-CV-6671

ADVANTA CORP., et al. :

VERDICT SHEET

PART ONE—LIABILITY

1. Did plaintiff Milton Riseman prove, by a preponderance of the evidence, that Advanta is liable to him for age discrimination under the Age Discrimination in Employment Act?

Yes   No ✓

2. Did plaintiff Milton Riseman prove, by a preponderance of the evidence, that Advanta is liable to him for retaliation under the Age Discrimination in Employment Act?

Yes ✓   No

If you answered "Yes" to Question 1 or Question 2, please answer Question 3. If you answered "No " to Question 1 and Question 2, please skip to Question 4.

3. Did plaintiff Milton Riseman prove, by a preponderance of the evidence, a "willful" violation of the

Age Discrimination in Employment Act, as that term was defined in the Court's instructions?

Yes ✓ No

4. Did plaintiff Milton Riseman prove, by a preponderance of the evidence, that Advanta is liable to him for breach of contract?

Yes ✓ No

5. Did plaintiff Milton Riseman prove, by a preponderance of the evidence, that Advanta is liable to him for detrimental reliance?

Yes ✓ No

6. Did plaintiff Milton Riseman prove, by a preponderance of the evidence, that Advanta is liable to him under the Pennsylvania Wage Payment and Collection Law?

Yes ✓ No

If you answered "No " to Questions 1, 2, 4, 5, and 6, the presiding juror may sign the verdict sheet, and you may return to the courtroom. If you answered "Yes " to Questions 1, 2, 4 or 5, but "No " to Question 6, please skip to Question 8 and continue. If you answered "Yes " to Question 6, please answer Question 7 and continue.

7. Did plaintiff Milton Riseman prove, by a preponderance of the evidence, that there was no good faith basis to deny him wages under the Pennsylvania Wage Payment and Collection Law?

Yes ✓ No

PART TWO—DAMAGES

Remember that if you have found for the plaintiff on more than one claim for relief, you may award him damages only once for the same financial injury. In other words, if you found Advanta liable to plaintiff Milton Riseman on more than one claim, you may not double count the same damages—for instance, any bonus amount—in your award.

8. What is the total amount of damages for which Advanta is liable to plaintiff Milton Riseman?

$3,939,126

9. What amount of damages, if any, have you awarded for "back pay" under the Age Discrimination in Employment Act?

$1,377,125

10. What amount of damages, if any, is plaintiff Milton Riseman entitled to under the Pennsylvania Wage Payment and Collection Law, although you may have awarded this amount under a different claim?

$2,562,001

/s/ Linda C. Connelly
Presiding Juror

12/5/00
Dated

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 01-3707 / 01-3844

MILTON RISEMAN,
Cross- Appellant
v.

ADVANTA CORP., ADVANTA MORTGAGE CORP., U.S.A., WILLIAM ROSOFF, DENNIS ALTER and OLAF OLAFSSON

*ADVANTA CORP. and ADVANTA MORTGAGE CORP., U.S.A.,
Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 98-CV 6671)
District Judge: Honorable Anita B. Brody

Argued: Tuesday, June 25, 2002

Before: BECKER, Chief Judge, SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, and GARTH[*], Circuit Judges

---

[*] Honorable Leonard I. Garth, Senior Judge for the Third Circuit, vote limited to panel rehearing only.

SUR PETITION FOR PANEL REHEARING AND REHEARING EN BANC

The petition for rehearing filed by Appellants/Cross-Appellees having been submitted to the judges who participated in the decision of this Court, and to all other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is denied.

By the Court,

/s/ [illegible]
Circuit Judge

Dated: August 8, 2002
DMM/cc: John M. Elliott, Esq.
Robert M. Goldich, Esq.
Mark J. Schwemler, Esq.

Supreme Court U.S.
FILED
JAN 3 2003
OFFICE OF THE CLERK

No. 02-882

IN THE
Supreme Court of the United States

ADVANTA CORP. AND
ADVANTA MORTGAGE CORPORATION, U.S.A.,
Petitioners,
v.
MILTON RISEMAN,
Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit**

BRIEF IN OPPOSITION

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January 3, 2003

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QUESTION PRESENTED

Whether the court of appeals properly applied the settled rule that an appellate reduction of a jury's verdict should be to the highest amount supported by the evidence to a state law claim for damages.

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STATEMENT OF THE CASE

This case does not remotely present the conflicts or constitutional errors that petitioners assert. Instead, in an unpublished disposition, the Third Circuit merely applied well settled legal principles to a particular set of facts in a case arising in relevant part solely under state law. Respondent Milton Riseman ("Riseman") regrets the need for even a somewhat lengthy opposition in such a case. In light of the misstatements and convoluted description of the governing law set forth in the petition, however, respondent believes that an accurate statement of the facts and issues would be of benefit to this Court.

The petition filed by Advanta Corporation and its subsidiary ("Advanta" or "the Company") is the latest chapter in petitioners' efforts to impeach a jury verdict in which the jury concluded not only that petitioners committed willful violations of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, Pet. App. 47a-48a, but that petitioners' additional withholding of wages owed to Riseman was done in bad faith in violation of state law, *id.* at 48a.

In 1992, Advanta hired Riseman from Citibank. Pet. App. 13a. Soon thereafter, in 1994, he was promoted to become President and Chief Executive Officer of Advanta Mortgage Corporation, USA ("Advanta Mortgage"), the Company's multi-billion dollar mortgage subsidiary. See *id.* "From 1992 to 1997, Riseman's performance was well received, and he was credited with having saved, turned around, and built the mortgage unit." *Id.* at 13a-14a (opinion of the district court). Indeed, under his leadership, Advanta Mortgage achieved exponential growth, became highly profitable and by 1998, it "account[ed] for 85% of the entire corporation's revenues, assets and profits." *Id.* at 14a.[1]

During 1997, while the Company was exploring strategic alternatives, including the possible sale of all or part of its business, it offered key executives a bonus opportunity that would be triggered by a "'change in control'" affecting the executive's group. See Pet. App. 14a. In the event of such a change in control, Advanta would pay Riseman 200% of his base salary as a bonus (the "1997 bonus"), an amount totaling $650,000. See *id.* When, later that year, Advanta entered into an agreement with Fleet Financial Group, it paid the change in control bonus to 67 employees, but not to Riseman. See *id.* at 15a. Separately, Advanta extended Riseman another bonus opportunity in March 1998 (the "1998 bonus"). By its terms,[2] Riseman would receive a bonus payment in the amount of $400,000 on March 31, 1999. See *id.* Finally, on a yearly basis, Advanta awarded to Riseman and others what it called "Advanta Management Incentive Program," or "AMIP," bonuses.

In 1997, Riseman sought a promotion to the vacant position of President of the parent corporation. The Company chose to fill the position not with the 61 year-old Riseman, but instead with a 35 year-old executive from another company who had no financial industry experience. Later, in August of 1998, the three top executives of Advanta informed Riseman that he was being replaced as President and CEO of Advanta Mortgage by an inexperienced executive 20 years his junior, and that they had created a new position for Riseman – "Chairman" of the mortgage subsidiary. See Pet. App. 15a. Riseman accepted that position. See *id.*

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[1] Riseman received a starting salary in 1992 of $200,000 per year. By 1998, he received a salary of $385,000 per year. Pet. App. 2a n.1.

[2] Specifically, to receive the bonus, Riseman had to (1) exercise "'flexibility and cooperation'"; (2) keep the arrangement "'confidential'"; and (3) be there "'at the time.'" Pet. App. 15a.

Almost immediately, Riseman became concerned that the position to which he had moved was not a "real" job. Thus, on August 17, 1998, Riseman's counsel sent a letter to Advanta, charging possible age discrimination. See Pet. App. 16a. The next day, Advanta's counsel responded with a letter explicitly advising Riseman that he remained an employee of Advanta. That same day, however, the Company's Vice Chairman informed Riseman to "'go home'" and not to report to work again. *Id.* Advanta soon thereafter informed its employees that Riseman had resigned; two months later, the Company sent Riseman a letter stating that he was being taken off the payroll. The Company never paid Riseman the 1997 bonus, the 1998 bonus, or his 1998 AMIP bonus. See *id.*

Riseman thereafter filed a complaint in the United States District Court for the Eastern District of Pennsylvania alleging, among other things, age discrimination and retaliation in violation of the ADEA, breach of contract, detrimental reliance, and violations of the Pennsylvania Wage Payment and Collection Law ("WPCL"), 43 Pa. Cons. Stat. § 260.1 *et seq.* See Pet. App. 17a. Riseman's WPCL claims centered on Advanta's withholding of the 1997 bonus, the 1998 bonus, and the 1998 AMIP bonus. At trial, "while insisting that the jury should receive instructions on the parameters of the 1997 and 1998 bonuses, Advanta did not seek an instruction regarding any damages ceiling on the AMIP bonus." *Id.* at 28a.[3]

After a three-week trial, a jury found in favor of Riseman and against Advanta on several counts. Specifically, the jury found that petitioners violated the anti-retaliation provision of the ADEA; that said violation was willful; that petitioners breached Riseman's employment contract; that petitioners were liable to Riseman for detrimental reliance; that petitioners violated the WPCL by withholding Riseman's bonuses; and that petitioners' violation of the WPCL lacked any good faith basis. See Pet. App. 47a-48a. The jury accordingly awarded Riseman (1) $1,377,125 in back pay under the ADEA and (2) $2,562,001 under the WPCL for the improperly withheld bonuses owed to him. See *id.* at 49a.

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[3] At trial, Riseman argued that the 1998 AMIP bonus was for an unliquidated amount, which should be established in reference to bonuses received during 1998 by other Advanta executives, many of which amounted to several million dollars. Advanta did not raise any objection to this contention and it never argued to the jury that there was a monetary limit to the 1998 AMIP bonus.

After the jury returned its verdict, Advanta moved for judgment as a matter of law and for partial new trial. In a lengthy unpublished opinion, the district court denied Advanta's motion (as well as a motion brought by Riseman) and entered judgment in favor of Riseman for $6,071,783.25. The judgment amount included statutory enhancements for liquidated damages under the ADEA and the WPCL as well as prejudgment interest on the back pay award. See Pet. App. 4a, 13a-45a.

In an unpublished decision, a unanimous court of appeals affirmed in part and reversed in part. See Pet. App. 2a. The court of appeals affirmed the jury's finding of unlawful retaliation under the ADEA and upheld the amount of back pay awarded by the jury. See *id.* at 4a. In doing so, it noted that the ADEA back pay award was justified without including any of the bonuses sought by Riseman in his complaint. See *id.* at 6a n.3. Next, the lower court rejected Advanta's claim that it should have been awarded judgment as a matter of law on Riseman's WPCL claim, holding: "[u]pon careful review of the record, we conclude that the jury was entitled to believe that Riseman satisfied all of the conditions necessary to receive each of the three bonuses, and also that *Advanta itself* believed that Riseman satisfied all of the conditions to receive the three bonuses." *Id.* at 7a; see also *id.* ("Indeed, this conclusion is consistent with the jury's specific finding that Advanta 'had no good faith basis' to deny Riseman the bonuses he sought under the WPCL.").

The court of appeals did, however, find merit in Advanta's contention that the 1998 AMIP bonus was "capped" at a level equal to Mr. Riseman's 1998 salary, or $385,000.00. It therefore reduced the WPCL damages award accordingly:

> Because Riseman's WPCL Claim consisted only of the 1998 Retention Bonus ($400,000), the 1997 Change of Control Bonus ($650,000) and the 1998 AMIP Bonus (limited to $385,000), the maximum damage award the jury could have provided under the WPCL was $1,435,000. . . .
>
> Accordingly, we will reduce the jury's $2.562 million WPCL award to $1,435,000. Because we are persuaded by the record that the jury verdict included all three bonuses in awarding the original $2.562 million WPCL award, we reject Advanta's contention that the jury's error requires a remand for a new trial with regard to the three bonuses under the WPCL.

Pet. App. 9a. The court of appeals remanded with instructions that the district court recalculate the WPCL liquidated damages. See *id.* at 12a.

REASONS FOR DENYING THE PETITION

Advanta now condemns the Third Circuit for giving it precisely what it requested. In doing so, Advanta attacks a limited portion of the jury's award,[4] and requests that this Court summarily reverse the decision of the Third Circuit or, in the alternative, grant certiorari. Advanta's arguments are without merit.

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[4] The Third Circuit flatly rejected the argument that any error in calculation regarding Riseman's bonuses requires a new trial on the retaliation claim, "because there is no overlap between the WPCL and the ADEA damage awards." Pet. App. at 9a; *id.* at 6a n.3 ("[W]e reject Advanta's contention that there was double-counting between the jury's ADEA award and its WPCL award."). Petitioners do not challenge this aspect of the Third Circuit's decision.

The questions presented in the petition are not remotely worthy of this Court's review. Petitioners present no conflict of federal authority that is relevant to this case. Instead, petitioners ask this Court to review summarily an unpublished decision of the Third Circuit and apply settled legal principles to a particular set of facts underlying the state law claims advanced by respondent below. Not only was the Third Circuit's ruling demonstrably correct, moreover, as is made evident by the petition itself, this case involves an inherently factbound question of no importance to anyone except the parties to the proceedings below.

1. The court of appeals' unremarkable application of settled law to the facts of this case does not warrant this Court's attention. Petitioners are really asking this Court to adopt the extraordinary and wholly unprecedented position that anytime a jury verdict is found to exceed the maximum amount of damages supported by the record or available under law, a new trial must automatically follow. In contrast to the assertions of petitioners, such an outcome is directly at odds with the Seventh Amendment. This Court has long emphasized that a degree of deference is ordinarily afforded to the jury's conclusions. See, *e.g.*, *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 424 (1994). It is for this reason that the courts of appeals, in keeping with this Court's decisions, *uniformly* apply the legal principle applied by the Third Circuit in this case – namely, appellate reduction of a jury's verdict to "the highest reasonable total of damages for which there is adequate evidentiary support in th[e] case" – is fully consistent with the Seventh Amendment. *Marchant* v. *Dayton Tire & Rubber Co.*, 836 F.2d 695, 704 (1st Cir. 1988) (applying the "maximum recovery rule"); see 11 Charles Alan Wright et al., *Federal Practice & Procedure* § 2815, at 167-68 (2d ed. 1995 & 2002 Supp.) ("Wright & Miller"). Further, in such circumstances, "the defendant [is] not in any way . . . prejudiced." *Marchant*, 836 F.2d at 704; Wright & Miller § 2815, at 167 ("[T]he jury by its excessive verdict intended

to award the maximum and defendant cannot complain of any judgment within the permissible limits."). Accordingly, the petition's broadest claim offers nothing worthy of this Court's review.

2. Petitioners rather weakly attempt to identify a conflict between the court of appeals' decision and decisions of other lower courts. The claim has no merit. Indeed, the two principal circuit decisions relied upon by petitioners highlight the illusory nature of their asserted conflict. *Jamison Co.* v. *Westvaco Corp.*, 526 F.2d 922 (5th Cir. 1976), on which they rely, presented circumstances in which the court of appeals reviewing the trial record was entirely unable to "calculate the maximum recovery on which to base the remittitur." *Id.* at 935. That is, the court could not ascertain the maximum possible amount to which the plaintiff might be entitled in light of the evidence. Here, by contrast, calculating that amount was straightforward. As the Third Circuit explained, the record was replete with evidence supporting the conclusion that Riseman was entitled to the three bonuses at issue. Pet. App. 7a. Even more striking, the lower court noted that the evidence demonstrated further that "*Advanta itself* believed that Riseman satisfied all of the conditions to receive the three bonuses." *Id.* Calculating the "maximum recovery" supported by the evidence in this case, therefore, required no speculation by the court of appeals. It merely reduced the WPCL award to the amount that properly respected the $385,000 "cap" on Riseman's 1998 AMIP bonus.

Petitioners reliance on *Shu-Tao Lin* v. *McDonnell Douglas Corp.*, 742 F.2d 45 (2d Cir. 1984), is equally misguided. The *Lin* court found itself in a situation in which "it [wa]s impossible to preserve a portion of the jury's verdict . . . by starting with [it] and cutting it down," because "prejudicial error ha[d] infected the jury's entire consideration" of the case. *Id.* at 50 (citation omitted). The purported error in this case – a belief on the part of the jury that they could award

Riseman a 1998 AMIP bonus payment in excess of the maximum apparently available to him – was, by contrast, easily quantified and addressed by the court of appeals. Thus, unlike the situation faced by the Second Circuit in *Shu-Tao Lin*, the court of appeals plainly was able to "'lop[] off an excrescence'" in the jury's verdict by a particular "quantifiable amount," *viz.*, the amount awarded by the jury in excess of that which was legally available to Riseman under his agreement with petitioners. *Id.* at 49 (quoting *Dimick* v. *Schiedt*, 293 U.S. 474, 486 (1935)). The lower court's reduction of the legal excess, accordingly, was fully consistent with the Seventh Amendment.

Second Circuit law after *Lin*, moreover, highlights why the Third Circuit's reduction of the award was fully appropriate. In *Earl* v. *Bouchard Transportation Co.*, 917 F.2d 1320 (2d Cir. 1990), that court emphasized that a court's objective in granting a remittitur must be to "minimize the extent of judicial interference with a matter that is otherwise within the jury's domain." *Id.* at 1328. To accomplish this goal and to remain "the most faithful to the jury's verdict," the court admonished, the proper course of a court faced with what it views as an excessive verdict is to "reduce the verdict only to the maximum that would be upheld . . . as not excessive." *Id.*; see *id.* at 1330 (adopting approach). This approach, which best respects the jury's verdict, see *id.* at 1329 (it is more "faithful to the jury's apparent intent"), was plainly followed by the Third Circuit here.

Indeed, *every* circuit to have faced this issue has adopted precisely the same "maximum recovery rule." Thus, the Circuits routinely hold in circumstances similar to those before the court below that "the verdict must be reduced to the maximum amount the jury could properly have awarded." *Caldarera* v. *Eastern Airlines, Inc.*, 705 F.2d 778, 784 (5th Cir. 1983); see also, *e.g.*, *Unisplay, S.A.* v. *American Elec. Sign Co.*, 69 F.3d 512, 519 (Fed. Cir. 1995) ("When calculating an amount to remit, in order to encourage use of the efficient remittitur option, we will follow the 'maximum recovery rule,' which requires that the determination be based on the highest amount of damages that the jury could properly have awarded based on the relevant evidence."); *Carter* v. *District of Columbia*, 795 F.2d 116, 135 n.13 (D.C. Cir. 1986) ("it is appropriate to set a remittitur so as to permit recovery of the highest amount the jury tolerably could have awarded"); *K-B Trucking Co.* v. *Riss Int'l Corp.*, 763 F.2d 1148, 1162-63 (10th Cir. 1985) ("'[A] remittitur order reducing a jury's award to the outer limit of the proof is the appropriate remedy where the jury's damage award exceeds the amount established by the evidence.'") (alteration in original). There is, in short, simply no conflict in the circuits on this matter.[5]

Not only was the Third Circuit's decision below fully consistent with the decisions of its sister circuits, moreover, it was demonstrably correct.[6] The Third Circuit properly reduced Riseman's WPCL award to "the highest reasonable total of damages for which there is adequate evidentiary support in th[e] case." *Marchant*, 836 F.2d at 704 (remitting award to maximum amount potentially supported by record and offering plaintiff option of accepting remittitur or electing new trial). Further, by following this approach, the court of appeals insured that the "*defendant[s] would not in any way be prejudiced*." *Id.* (emphasis added). This is because, as leading commentators have recognized, a defendant simply "cannot complain of any judgment within the permissible limits." Wright & Miller § 2815, at 167. Advanta's efforts to do so are both wrong and unworthy of this Court's consideration.

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[5] If anything, the only party who could possibly claim injury flowing from the Third Circuit's decision is *respondent* as, in each of the above-cited decisions, the court of appeals gave the plaintiff – but never the defendant – the option of electing to re-try the damages issues. *See, e.g.*, *Caldarera*, 705 F.2d at 786; *Carter*, 795 F.2d at 135.

[6] Indeed, the cases relied upon by petitioners apply the maximum recovery rule, *see, e.g.*, *Deakle* v. *John E. Graham & Sons*, 756 F.2d 821, 827-28 (11th Cir. 1985) (cited at Pet. 13), and highlight that an appellate remittitur of excessive damages leaves only the plaintiff – if anyone – with the option of a new trial, *see, e.g.*, *Kropp* v. *Ziebarth*, 601 F.2d 1348, 1354-55 (8th Cir. 1979) (cited at Pet. 13).

3. Unable to identify any decisional conflict among the courts, petitioners are left to argue that the Third Circuit improperly applied the correct legal standard to the peculiar facts of this case. Apart from the fact that such a determination is inappropriate for this Court's attention, see Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."), the record reflects that the court of appeals' application of the law to the particular facts in this case was not only unexceptional but also entirely correct.

Petitioners' argument to the contrary consists of a lengthy recitation of this Court's Seventh Amendment decisions, all of which plainly support the decision below. First, petitioners advance the unremarkable proposition that "[w]here the effect of an error on liability or damage determinations is clearly ascertainable, an appellate court may properly permit the entry of judgment in a correct amount, at least with the consent of the aggrieved party." Pet. 6. With the singular exception of offering a new trial *to respondent*, that is precisely what the Third Circuit did in this case.

Petitioners go on to rely on a series of cases involving prejudicial error that infected the entirety of the jury's consideration of a case. Thus, Advanta relies on *Maryland* v. *Baldwin*, 112 U.S. 490 (1884), a case in which inadmissible testimony was permitted to be heard by the jury and this Court found it "impossible to say what effect [the improper testimony] may have had on the minds of the jury" when deciding the liability question underlying the entire case. *Id.* at 494. Petitioners next cite *Memphis Community School District* v. *Stachura*, 477 U.S. 299 (1986), a case in which this

Court remanded for a new trial because the damages instruction permitted the jury to predicate its general compensatory damages verdict upon two distinct types of damages, one of which was unavailable to the plaintiff. See *id.* at 312-13. Because the consideration of the improper element of damages called into question the entire compensatory damages award, there remained nothing salvageable in that aspect of the jury's verdict. See *id.*

These decisions are entirely inapposite to this case, which does not involve error that undermines the integrity of the jury's verdict and damages award on Riseman's WPCL claim. Rather, the error found by the Third Circuit was that the jury found full liability on the WPCL claim but awarded damages that exceeded the maximum available in light of the record. Such an error is easily quantified and properly addressed by a reviewing court. This is because such an error is no different from a case in which a jury finds full liability but awards damages in excess of a statutory limit, a situation in which reviewing courts routinely reduce the damages accordingly. *Accord Southern Ry.-Carolina Div.* v. *Bennett*, 233 U.S. 80, 87 (1914) (Holmes, J.) (observing that where a verdict exceeds the maximum amount allowed per statute, the question posed to a reviewing court is one of law and not of fact); *Deters* v. *Equifax Credit Info. Servs., Inc.*, 202 F.3d 1262, 1273 (10th Cir. 2000) (noting the standard procedure for capping damages under 42 U.S.C. § 1981a: "Section 1981a establishes a regime whereby the jury will set the damages, without reference to the statutory cap. Then, if the damages awarded exceed the relevant limit, the district court shall reduce the amount so that it conforms to the statutory cap.").

Indeed, additional authority relied upon petitioners, *Dimick* v. *Schiedt*, 293 U.S. 474 (1935), underscores the correctness of the decision below. The Court in *Dimick* (a case that actually involved the practice of additur) opined that judicial reduction of a damages award is fully appropriate where, as here, the court can ascertain the amount of "excess" in the award and "lop[]" it off as "excrescence." *Id.* at 486. Following the Court's guidance in *Dimick*, courts of appeals routinely reduce damages awards in similar cases to the highest amount of damages for which there is support in the record. See, *e.g.*, *Marchant*, 836 F.2d at 704. "The remaining total is a reasonable one which cannot be challenged," because all that the court has done is eliminate what is excess in the award. See *id.* (citing *Dimick*, 293 U.S. at 486).

Finally, petitioners rely upon this Court's recent decision in *Hetzel v. Prince William County*, 523 U.S. 208 (1998) (per curiam), to argue that summary reversal may be appropriate in this case. The instant case, however, has nothing in common with *Hetzel*. *Hetzel* involved a question over the *right of the plaintiff* to a new trial in the face of a reduction in plaintiff's damages on appeal. Specifically, a jury had held in plaintiff's favor on civil rights claims and awarded her $500,000 in damages. The Fourth Circuit directed that the award was grossly excessive in light of the evidence of harm presented by the plaintiff at trial. Accordingly, it set aside the award in favor of an award of $50,000. See *id.* at 209. This Court held only that the court of appeals should have afforded the plaintiff the option of a new trial prior to entering judgment for the reduced damages. Under *Hetzel* and a long line of this Court's Seventh Amendment decisions involving appellate remittiturs, however, the defendant must live with a plaintiff's choice to elect for remitted damages and has no independent right to a new trial. See, *e.g.*, *Hansen* v. *Boyd*, 161 U.S. 397, 411 (1896) (proper course is to offer *plaintiff* choice between remitted amount and new trial); *Northern Pac. R.R.* v. *Herbert*, 116 U.S. 642, 646-47 (1886) (same).

Hetzel is further distinguishable because there the "discretionary decision [to reduce the damages award] necessarily involved a reweighing of the evidence and reassessment of the appropriate amount of damages warranted by the facts." *Tronzo v. Biomet, Inc.*, 236 F.3d 1342, 1351 (Fed. Cir.) (describing and distinguishing *Hetzel*), *cert. denied*, __ U.S. __, 122 S. Ct. 580 (2001). By contrast, just as in a recent case before the Federal Circuit, "in the present case, the . . . court did not reweigh any evidence, nor did it exercise its discretion in computing the damages award." *Id.* All that the Third Circuit did was award the maximum damages possible given the evidence presented at trial. In such circumstances, it is not clear that the plaintiff is entitled to a new trial, see *id.* ("because, as a matter of law, the compensatory damages award could not exceed" the reduced amount, "re-presenting this issue to the jury would have been pointless"); it is, however, quite clear that the defendant is not entitled to a new trial. *See, e.g.*, Wright & Miller § 2815, at 159 (where "it is apparent as a matter of law that certain identifiable sums included in the verdict should not have been there" it is appropriate for the court to reduce the amount of damages correspondingly). This is because the error in question is legal – a point with which petitioners do not appear to quarrel. See Pet. 2 ("the court of appeals correctly determined that the jury's damage award exceeded the maximum amount to which the employee could ever have been *legally* entitled.") (emphasis added).

Accordingly, Advanta's endless hypothetical calculations, Pet. 8-9, prove nothing. Indeed, if accepted, their argument would mean that every time a jury awards damages in excess of a statutory cap, for example, a new trial would be warranted. This has never been the law of this or any other court, and such a rule would do serious injury to the Seventh Amendment's respect for the work of a jury. In deference to the jury's award, instead, it is standard practice for courts to reduce damages to the maximum amount supported by the record or permissible as a matter of law. See, *e.g.*, *Deters*, 202 F.3d at 1273 (approving reduction of award to statutory cap); *Westchester Fire Ins. Co.* v. *Hanley*, 284 F.2d 409, 418 (6th Cir. 1960) (concluding that due to required apportionment of damages, verdict awarded against single defendant must be reduced by dictated amount); see also, *e.g.*, *Kolb* v. *Goldring, Inc.*, 694 F.2d 869, 874-75 (1st Cir. 1982) (concluding that a remitted award for the maximum amount of damages supported by the evidence was appropriate subject to plaintiff's right to a new trial) (cited at Pet. 14 n.8). The Third Circuit's application of these longstanding principles was neither exceptional nor incorrect.

* * * *

This case presents no question worthy of certiorari, and the asserted conflicts of authority that petitioners conjure up are nonexistent. In short, petitioners have failed to identify any conflict between the decision below and the decisions of this Court of or any other court. The Third Circuit's holding with respect to the reduction of respondent's damages on his state law claims is plainly correct, and therefore nothing warrants this Court's intervention.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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No. 02-882

IN THE

Supreme Court of the United States

ADVANTA CORP. AND
ADVANTA MORTGAGE CORPORATION, U.S.A.,
Petitioners,

v.

MILTON RISEMAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondent's entire brief in opposition is based on the false premise that the jury "found full liability" on his contractual claims for three separate bonuses, even if it then "awarded damages that exceeded the maximum available in light of the record." Br. in Opp. 11. As the petition makes clear, however, it is simply impossible to know from the record, and in particular the verdict form, just what the jury found with respect to Advanta's liability for each bonus. *See* Pet. 8-9. That critical circumstance makes all respondent's arguments inapposite, and leaves him with no answer to our showing that the decision below cannot be reconciled with the Seventh Amendment.

1. We do not contend that there must be a new trial "anytime a jury verdict is found to exceed the maximum amount of damages supported by the record or available un-

der law." Br. in Opp. 6; *see id.* at 13. A court may properly use remittitur to correct an excessive verdict, *if* the precise effect of an error is clearly ascertainable from something in the record, such as a detailed special verdict form. *See* Pet. 6, 11. Remittitur may also be used where the jury erred by awarding too much for some item of damages, such as pain and suffering, that is necessarily uncertain as to amount, and the court's order merely "lop[s] off an excrescence." *See* Pet. 6-7 (quoting *Dimick* v. *Scheidt*, 293 U.S. 474, 486 (1935)); *see also* Pet. 11-12 (discussing *Lin* v. *McDonnell Douglas Corp.*, 742 F.2d 45, 49 (2d Cir. 1984), and the treatment of "intrinsically excessive" damages).[1] In such circumstances, the *plaintiff's* right to a jury trial is normally preserved through an option to refuse the reduced award and demand a new trial. The *defendant's* right to a jury is not infringed, so long as each part of the verdict that survives, as to both liability and damages, is still supported by specific findings that are known from, or necessarily implied by, the jury's original verdict. *See Dimick*, 293 U.S. at 486; *Marchant*, 836 F.2d at 704.

The situation is different where a reviewing court must correct an excessive verdict, but the verdict form or other circumstances make it impossible to know which of several possible liability findings, leading to significantly different damages, the jury actually made. In such a case, the defendant is aggrieved by a judicial decision that presumes the liability findings most favorable to the plaintiff.[2]

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[1] Respondent relies principally on cases of the second type. *See, e.g.*, *Marchant* v. *Dayton Tire & Rubber Co.*, 836 F.2d 695, 703-04 (1st Cir. 1988) (reducing award for pain and suffering); *Earl* v. *Bouchard Transp. Co.*, 917 F.2d 1320, 1327-30 (2d Cir. 1990) (sustaining reduction of award of general damages); *Caldarera* v. *Eastern Airlines, Inc.*, 705 F.2d 778, 783-86 (5th Cir. 1983) (ordering remittitur based on excessive awards for loss of companionship). As discussed below (*see* pp. 4-5, *infra*), the claim that there is no conflict in the circuits ignores the difference between such cases and a case like this one (and like *Jamison Co.* v. *Westvaco Corp.*, 526 F.2d 922 (5th Cir. 1976)), in which revision of the jury's damage award requires speculation as to its findings with respect to liability.

As the petition explains, that is precisely what happened in this case. *See* Pet. 5, 8-9. Respondent claimed a contractual entitlement to three separate bonuses—two fixed in amount, one variable but capped. His lawyer's closing argument ignored the cap on the third bonus, and invited the jury to make a very large award on the basis of that bonus alone. *See* Pet. 3. The jury returned a general verdict for an amount greater than respondent could properly have received even if he had received the maximum amount for all three bonuses. That award clearly reflected jury error of some sort, and could not be sustained. *See* Pet. App. 8a-9a. Contrary to respondent's submission (Br. in Opp. 11), however, nothing in the verdict shows that the jury "found full liability" on respondent's claims under the WPCL. Rather, as the petition makes clear, *see* Pet. 8-9, there is simply no way to tell with certainty just how the jury erred in computing damages, or what it found as to Advanta's contractual liability to respondent on any particular one of the three bonuses. Respondent's telling inability to refute our demonstration that there are a number of hypothetical liability findings consistent with the verdict form in this case (*see id.*) confirms that the court of appeals was simply speculating when it reached the pivotal conclusion (Pet. App. 9a) that it was "persuaded by the record" that "all three bonuses" were included in the jury's damage award under the WPCL.

Respondent cannot avoid review by mischaracterizing our argument. It is obviously not true, for example, that

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[2] If anything the rule would have to be the converse: To avoid giving the defendant the right to demand a new trial, the court would have to reduce the award to reflect "*the maximum [possible] effect of the error.*" *See Liberty Mutual Ins. Co.* v. *Continental Casualty Co.*, 771 F.2d 579, 588 (1st Cir. 1985) (quoting 6A J. Moore, J. Lucas & G. Grotheer, *Moore's Federal Practice* ¶ 59.08[7], at 59-208-210) (footnotes omitted and emphasis added by the court)).

"every time a jury awards damages in excess of a statutory cap, . . . a new trial would be warranted." Br. in Opp. 13. In *this* case, however, although some error resulting in excessive damages is obvious on the face of the verdict, the precise nature of the error cannot be surely ascertained and corrected. Any reduced award must instead rest on judicial speculation as the jury's exact conclusions regarding liability. Under those circumstances, the Seventh Amendment gives the defendant the right to a new trial.

2. For the same reasons, respondent fails in his attempt to distinguish this case from *Jamison Co.* v. *Westvaco Corp.*, 526 F.2d 922 (5th Cir.), *reh'g denied*, 530 F.2d 34 (1976). *See* Br. in Opp. 7. As respondent notes (*id.*), the court below concluded that the record contained sufficient evidence to support a jury finding of liability as to each bonus. *See* Pet. App. 7a.[3] The Seventh Amendment question is not, however, what recovery a court might conclude was "supported by the evidence." Br. in Opp. 7. The question is what liability findings are actually established by the jury's verdict. The court below never pointed to anything in the record establishing that the jury in this case found liability as to each bonus. To the contrary, when that question become relevant for purposes of correcting the jury's damage award, the court only declared itself "persuaded by the record" that such findings were what the jury had in mind. *Id.* at 9a. That declaration involves precisely the sort of judicial speculation rejected by *Jamison*. *See* 530 F.2d at 34 (order denying rehearing) (new trial required where it is impossible "to determine the theory of liability on which the jury premised its overly generous verdict").

Respondent's discussion of the Second Circuit's decision in *Lin* (Br. in Opp. 7-8) embodies a similar error. It is incorrect to say (*id.*) that "[t]he purported [jury] error in this case" was "a belief . . . that they could award Riseman a 1998 AMIP bonus payment in excess of the maximum apparently available . . . ." That argument proceeds as though only one bonus was at stake. If that were true, then the error reflected in an excessive award would indeed have been "easily quantified and addressed by the court of appeals." *Id.* at 8. Moreover, the resulting award would still have rested firmly on the original finding of liability, which the jury would have *had* to make in order to make any award at all. In this case, by contrast, the problem is that given the multiple bases for liability presented to the jury, there is no way for anyone to know exactly how it erred in arriving at its excessive award. That is why Advanta is entitled to a new trial. *Cf. Carter* v. *District of Columbia*, 795 F.2d 116, 134-35 (D.C. Cir. 1986) (R.B. Ginsburg and Bork, JJ.) (improper to reduce award without giving plaintiffs the option of a new trial where effect of error on award was "destined to remain unknown and unknowable, given the summary, opaque nature of the special verdict form" (footnote omitted)).

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[3] The court reached that conclusion in the course of rejecting Advanta's arguments that it was entitled to judgment as a matter of law with respect to two or all three of the bonuses. *See* Pet. App. 6a-7a.

3. Respondent's effort to distinguish this Court's Seventh Amendment cases (Br. in Opp. 10-13) likewise depends entirely on his contention that in this case the effect of the jury's error on its damage award is "clearly ascertainable." *Id.* at 10 (quoting Pet. 6). For the reasons already stated, that contention is incorrect. Respondent's assertions to the contrary notwithstanding, this case *does* "involve error that undermines the integrity of the jury's verdict and damages award," and is distinctly different from "a case in which a jury finds full liability but awards damages in excess of a statutory limit." Br. in Opp. at 11. While it is true that "[a]ll" the court of appeals did was to "award the maximum damages possible given the evidence presented at trial" (*id.* at 13), in this case that approach required the court first to decide for itself that the jury must have intended to find liability under the WPCL on each of three distinct grounds. That approach "necessarily involved a reweighing of the evidence and reassessment of the appropriate amount of damages war-

ranted by the facts." *Id.* at 12-13 (quoting *Tronzo* v. *Biomet, Inc.*, 236 F.3d 1342, 1351 (Fed. Cir.) (discussing *Hetzel* v. *Prince William County*, 523 U.S. 208 (1998) (per curiam)), *cert. denied*, 122 S. Ct. 580 (2001)). Such a judicial reweighing does not become permissible under the Seventh Amendment simply because it is a defendant's rights, rather than a plaintiff's, that are at stake. *Compare Hetzel*, 523 U.S. at 211 (citing *Dimick* for the proposition that "where a verdict is set aside . . . , *both* parties remain entitled to have a jury determine the issues of liability and the extent of injury" (emphasis added)).

Indeed, respondent does not appear to quarrel with our reading of the import of decisions such as *Hetzel*, *Memphis Community School District* v. *Stachura*, 477 U.S. 299 (1986), *Dimick*, and *Maryland* v. *Baldwin*, 112 U.S. 490 (1884). *Compare* Br. in Opp. 10-13 *with* Pet. 6-8. He argues only that those cases are inapposite, because here the error in awarding damages was "easily quantified," and left no doubt about the jury's findings on liability. *See* Br. in Opp. 11. Because the Court could properly evaluate and reject that argument on the basis of the papers already before it, we again respectfully suggest that the Court consider summary reversal. *Cf. Hetzel*, *supra*.

4. Respondent also suggests that the Court should deny review here because the decision below involves underlying claims based on state law; because the question presented is "inherently factbound" and of no importance to anyone but the parties; and because the decision is unpublished. *See* Br. in Opp. 1, 6, 14.

Respondent's references to state law are a distraction. Respondent nowhere contests that the Seventh Amendment right to a jury trial attached to the trial in federal court of respondents contract-based claims under the WPCL. *See* Pet. 5 n.3. How that right applied, or should have applied, in this case is purely a question of federal law. Ultimately, only this

Court can protect the Seventh Amendment rights of federal litigants.

The suggestions that this case is "factbound" or unimportant are equally meritless. The underlying facts are undisputed for present purposes, and are relevant only to the extent that—like the facts in any case—they serve to frame the legal question presented. In that regard, the facts here are elegantly simple. As the petition points out (at 5), they present this Court with a situation in which (i) the jury's damage award is demonstrably erroneous, but (ii) it is not possible to tell with certainty from the verdict how the jury erred, or what grounds of liability it actually found as the basis for its award. That conjunction of circumstances, clear from the opinion below, provides this Court with everything it needs to evaluate whether the court of appeals' judgment violated petitioner's Seventh Amendment rights. The answer to that question is potentially important to every litigant, and surely to every defendant, in every federal civil action.

Finally, the fact that the decision below is unpublished is more an indication of the need for guidance than a reason to deny review. The court of appeals' opinion, like respondent's brief in opposition, reflects a basic misunderstanding of the roles of judges and juries. That misunderstanding is not less profound, or less important, because it arises in a context—appellate remittitur of a damage award—that evidently *seemed* to the court of appeals so routine as not to call for publication. If a court of appeals decided that an employee suing his employer in federal court for an unpaid bonus did not have a right to a jury trial, the court's failure to publish its decision would not reduce the magnitude of its Seventh Amendment error. The decision below in this case had the same impact on Advanta's right to have a jury decide which of three bonuses respondent earned. The court of appeals' inattention to Advanta's constitutional right to a jury determination of liability on each bonus claim only underscores the need for this Court's intervention. Indeed, that is as true here as it was in *Hetzel*—in which the Court also reviewed, and summarily reversed, an unpublished decision that disregarded this Court's teachings concerning a federal litigant's Seventh Amendment rights. *See* 523 U.S. at 209-10.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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